

Applicant Details

First Name **Jeffrey**
 Middle Initial **H**
 Last Name **Abney**
 Citizenship Status **U. S. Citizen**
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305 W. Fayette St. 909
City
Baltimore
State/Territory
Maryland
Zip
21201
Country
United States

Contact Phone Number
3143590475

Applicant Education

BA/BS From **Webster University**
 Date of BA/BS **May 2018**
 JD/LLB From **University of Maryland Francis King Carey School of Law**
http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=52102&yr=2011
 Date of JD/LLB **May 13, 2021**
 Class Rank **50%**
 Does the law school have a Law Review/Journal? **Yes**
 Law Review/Journal? **No**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

References

Available upon Request

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jeffrey H. Abney

305 W. Fayette St. 909, Baltimore, MD 21201

jabney@umaryland.edu

(314) 359-0475

July 31, 2020

Good afternoon,

I am a third-year student at University of Maryland Francis Carey Law School and am writing to apply for your Judicial Clerkship position starting in 2021. After six years of active-duty military, working in human resources, interning at the Office of Special Counsel, and interning at two Attorney General's offices, I believe a Clerkship would be a great use of my experience. I feel confident that I could contribute while strengthening the legal skills and experience I will need to be a successful attorney. I believe that the best way for me to improve as an attorney is to work in the court system and learn the proper way it operates.

As a law student I focused my education on consumer protection, criminal law, and administration law. My career goals are to be in a position to acquire litigation experience and grow as an attorney in a field I can be proud of. I also was President of the University of Maryland Association of Legislative Law where I became familiar with drafting and reviewing proposed legislation, regulations, and advancing policies. I have a vast amount of experience working closely with multiple agencies and team members towards a unified goal.

My experiences in law school and my professional life have allowed me to help the people of Baltimore in small and incremental ways and I hope you consider me for the Clerkship. I feel it will allow me to help in bigger and more substantial ways.

I would be proud to work for your offices and have enclosed my resume. I hope to have the opportunity to interview with you. Thank you in advance for your consideration.

Sincerely,

Jeffrey Abney

Jeffrey H. Abney

305 W. Fayette St. 909, Baltimore, MD 21201

jabney@umaryland.edu 314-359-0475

EDUCATION

University of Maryland Francis Carey School of Law
Juris Doctor Candidate 2021

GPA: 2.95

Webster University
Bachelor of Arts: Legal Studies

GPA: 3.94

EXPERIENCE

Rhode Island Office of Attorney General, Providence, RI June 2020 – August 2020
Summer Law Intern, Criminal Division, Diocese Investigation Supervisor: Ryan Holt 401-274-4400 Ext. 2507

- Conduct extensive document review, specifically historical memos, transcripts, investigation records, and handwritten notes
- Summarize allegations and put in chronological order all material events and facts pertaining to allegations and investigation measures taken

University of Maryland Francis Carey, Baltimore, MD May 2020 – August 2020
Legal Research Assistant, Consumer Protection Supervisor: Michael Milleman 410-706-8340

- Conduct extensive research on over-incarceration in the United States with statistical driven analysis

Maryland Office of Attorney General, Baltimore, MD January 2020 – May 2020
Clinic Law Clerk, Consumer Protection Division Supervisor: Michael Milleman 410-706-8340

- Conduct research on current and pending cases/laws pertaining to Negative Options
- Research and co-wrote white paper on Body Attachment Orders
- Create a primer for Stem Cell Therapy based on historical and current laws, cases, and FDA/FTC guidelines
- Document review of financial ledgers, rental payment history, tenant complaint records
- Contact potential witnesses and conduct detailed phone/in-person interviews

Office of Special Counsel, Washington, DC May 2019 – November 2019
Law Clerk, Disclosure Unit Supervisor: Catherine McMullen 202-804-7088

- Responsible for reviewing incoming Whistle Blower claims
- Conduct independent legal research on relevant laws, regulations, and rules
- Analyze Whistle Blower claims based on research
- Draft referral letter or closure letter to send to relevant Inspector General or Whistle Blower

Sunnen Products Co, Saint Louis, MO April 2017 – August 2018
Human Resources Generalist, Corporate Supervisor: Mark Willet 314-781-2110

- Directly responsible for recruiting of all positions as well as ad placement; screening; testing; offer letters; compensation packages
- Prepare and maintain personnel records using ADP and HRMS software
- Interpret and explain human resources policies, procedures, laws, standards, and regulations
- Evaluate job positions, determine classification, exempt or non-exempt status, salary grading
- Ensure company compliance with federal and state laws, including reporting requirements
- Analyze and modify compensation and benefit policies
- Member of 401k committee that handles 100m+ of employee retirement funds

- Member of Benefit Advisory Board to determine and manage employee health, dental and vision insurance plans and coverage
- Responsible for onboarding new hires
- Create company newsletter (monthly)
- Knowledge of principles and procedures for personnel recruitment, selection, training, compensation and benefits, labor relations and negotiation, and personnel information systems

MGM Healthcare, Saint Louis, MO

August 2016 – April 2017

Human Resources Generalist, Corporate

Supervisor: Lisa Filkins 314-631-3000

- Directly responsible for the human resources needs of 12 medical facilities
- Coordinated unemployment claims and filing unemployment disputes with the state
- Coordinating Workers Compensation claims with our insurance agency
- Assist in Union contract negotiations
- Responsible for crafting Offer letters
- Prepare and maintain personnel records using IPS and HRMS software
- Resolved work-related problems between employees and management
- Knowledge of business and management principles involved in strategic planning, resource allocation, human resources modeling, leadership technique, production methods, and coordination of people and resources

Kasco Corp, Saint Louis, MO

January 2016 – August 2016

Corporate Master Trainer

Supervisor: Ken Ratliff 314-771-1550

- Conducted new-hire orientation
- Trained technicians in advanced mechanics and electrical theory throughout the country
- Managed and maintained all training records for 150+ technicians
- Test performance of electromechanical assemblies, using test instruments such as oscilloscopes, electronic voltmeters, or bridges
- Taught new hires schematic reading; install electrical or electronic parts and hardware in housings or assemblies, using soldering equipment and hand tools

United States Army, Fort Carson, CO/Camp Humphries, South Korea/HAAF, GA

April 2010 – January 2016

Sergeant, NCOIC Ammo Bunker, NCOIC Utilities Repair Shop, NCOIC Orderly Room, NCOIC Arms Room

- Responsible for the well-being and 15 Soldiers directly under me
- Managed inventory of Ammo Bunker which included up to 10 million worth of assets
- Test pipe or tubing joints or connections for leaks, using pressure gauge or soap-and-water solution
- Repair or replace defective equipment, components, or wiring
- Repair or service heating, ventilating, and air conditioning (HVAC) systems to improve efficiency, such as by changing filters, cleaning ducts, or refilling non-toxic refrigerants
- Managed inventory of entire Arms room which included up to 6 million worth of assets
- Managed and maintained personnel records and processed all paperwork for the company
- Responsible for the well-being and day to day operations of 2-12 H Company and it's 160 Service Members

Awards

CALI AWARD: Consumer Protection, Army Achievement Medal (3), Army Commendation Medal, Army Volunteer Ribbon, Global War on Terrorism Ribbon, Army Expert Marksmanship Badge, Army Drivers and Mechanics Badge, Army Certificate of Achievement (5), Army Overseas Ribbon, Korean Defense Medal, Non-Commissioned Officer Development Medal

School Activities

Animal Legal Defense Fund – Vice President 2019-2020

University of Maryland Association of Legislative Law – President 2019-2020

Volleyball Team – Captain 2018-2020 Basketball Team – Captain 2018-2020

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-160

UNITED STATES,

Appellant,

v.

Alex Barker,

Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

**(THE HONORABLE REBECCA LINEBERRY
UNITED STATES DISTRICT JUDGE)**

BRIEF OF APPELLEE

Respectfully submitted,

**Jeffrey Abney, Esq
Assistant Federal Public Defender
District of Maryland
100 S. Charles Street
Baltimore, MD 21201**

Counsel for Appellee

March 5, 2019

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<i>McClish v. Nugent</i> , 483 F.3d 1231 (11th Cir. 2007)	9, 10, 11
<i>Morse v. Cloutier</i> , 869 F.3d 16 (1st Cir. 2017)	11, 12
<i>Payton v. New York</i> , 445 U.S. 573 (1980)	7, 8, 10, 11, 12
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<i>United States v. McCraw</i> , 920 F. 2d 224 (4th Cir. 1990)	8, 9, 11, 12
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<i>United States v. Santana</i> , 427 U.S. 38 (1976)	5, 12, 13
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**IN THE UNITED STATES COURT OF APPEALS
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No. 19-160

UNITED STATES,

Appellant,

v.

Alex Barker,

Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

**(THE HONORABLE REBECCA LINEBERRY
UNITED STATES DISTRICT JUDGE)**

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Appellee, Alex Barker (Barker), was charged with possession of a firearm as a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1). (J.A. 12). The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. This Court has appellate jurisdiction under 18 U.S.C. § 3731 to review the district court's decision, dated March 4, 2019, which granted Barker's motion to suppress evidence. (J.A. 15). The United States filed a timely notice of appeal on March 4, 2019. (J.A. 17).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Under the Fourth Amendment, did the district court err when it determined that Barker's arrest was unconstitutional where Barker opened his door and told the detectives to leave if they did not have a warrant before Detective Davis reached across the threshold and arrested him?

2. Under the Fourth Amendment, did Detective Davis have probable cause to support a warrantless arrest of Barker when he corroborated only general information that was public knowledge from an anonymous, unknown tipster under the totality of the circumstances?

STATEMENT OF THE CASE

After an arrest on October 28, 2018, the Grand Jury for the District of Maryland indicted Alex Barker (Barker) for being a prior felon in possession of a firearm in violation of Title 18 U.S.C 922(g)(1). (J.A. 1). Prior to the preliminary hearings on January 11, 2019 and February 22, 2019, Barker filed a motion to suppress the firearm in district court. (J.A. 2). After the two preliminary hearings the defense maintained that Jackie Davis (Detective Davis) violated Barker's Fourth Amendment rights by conducting an illegal search and seizure. (J.A. 2).

On March 4, 2019 the district court granted the suppression of the firm and held "that under the Fourth Amendment, police may not, without a warrant, reach across the doorway of a suspect's home to arrest him." (J.A. 12-14). The court reasoned that "Barker did not give up his expectation of privacy by exposing himself to public view" because he "opened the door in response to a knock." (J.A. 13). The court noted Barker did not give up his right to privacy because "he opened the door as a result of the police officer's knock" and Barker "exercised his right to privacy by asking the officers to leave." (J.A. 13-14). While not ruling on the probable cause issue, it recognized that it would be "hard-pressed to find probable cause in this case", it

reasoned that the detectives “relied on a generic and anonymous telephone message” and that the detectives corroboration efforts were “minimal”, and they could “corroborate very little information.” (J.A. 14). On March 4, 2019, the United States Attorney then filed a timely appeal with the court. (J. A. 19).

On October 28, 2018, when Detective Davis, an officer with the Baltimore Police Department, heard a message that had come in the night on the Crime Stoppers tip line. (J.A. 3). The message was from an anonymous tipster the detective did not know, had not met and did not speak to personally stating that there was a “narcotics distributor” named Alex Barker who operated in Baltimore and that he got his drugs from Miami. (J.A. 3). The message then gave general information about how Barker gets his drugs from a courier at the airport, a description of Barker’s vehicle, a general description of Barker’s house with a specific mention of “Carolina Blue Shutters”, and that a “young woman with dark brown hair” would be his passenger. (J.A. 4).

Detective Davis ran a public record check to confirm Barker’s public information. (J.A. 5). Detective Davis and his partner drove up and positioned themselves on I-95. (J.A. 5). Instead of going to BWI, Detective Davis and partner drove up and positioned themselves on 1-95 sometime after 4 p.m. (J.A. 5). At 4:45 p.m. they spotted a driver that “seemed” to match the description of Barker. (J.A. 5). The two detectives began to follow the vehicle and they “observed a young woman” with “red hair” in the passenger’s seat. (J.A. 5).

The detectives proceeded to lose the vehicle in traffic and decided to drive to Barker’s address, where there was no mention of “Carolina Blue Shutters” from the tipster. (J.A. 6). Without announcing that they were police and without being in full police uniform they proceeded to knock on Barker’s door. (J.A. 6). At 6:15 or so in the evening darkness, a man

matching Barker's description "peak[ed][sic] out from a window." (J.A. 10). He then opened the front door and told Detective Davis he was Alex Barker and "unless [Davis] had a warrant, he wanted [Davis] to get off his property." (J.A. 6).

The Detective and his partner were "outside on the porch" and Barker was "in the doorway of the house." (J.A. 6). Detective Davis then reached inside the house, fully inside the threshold, with his "hands and arms" to cuff Barker and arrest him. (J.A. 7). Detective Davis then searched Barker and while a gun was found, no drugs were found at all. (J.A. 8). The detectives searched Barker, a duffle bag, and the entire house but found no drugs or narcotics of any kind. (J.A. 8).

SUMMARY OF THE ARGUMENT

The district court correctly granted Barker's motion to suppress evidence because the arrest, and subsequent search and seizure were unconstitutional under the Fourth Amendment of the United States Constitution.

Barker did not waive his right of privacy when he responded to the knock on his door by the police who had not identified themselves. Barker was not standing at the threshold of his doorway at the time the authorities arrived but opened as a result of the knocking. Barker had not relinquished his expectation of privacy like the Santana line of cases. Barker did not waive his expectations of privacy upon opening the door to the knock from the unidentified police and Barker clearly stated he wished to exercise his right to privacy by asking the officers to leave unless they had a warrant for his arrest.

Furthermore, the detectives violated Barker's Fourth Amendment rights when they failed to obtain an arrest warrant before they reached across the threshold of his home and placed him

under arrest. The police may not, without a warrant, reach across the doorway of a suspect's home to arrest him. Barker cannot be arrested in his home without an arrest warrant, absent exigent circumstances, because he has the right to retreat into his own home and there be free from unreasonable government intrusion.

The detectives did not corroborate enough information to compensate for the anonymity of the tipster. The Fourth Circuit has found that the conclusion that an informant is reliable and mature based only on brief telephone conversations is dubious. The Fourth Circuit standard is the minimal corroboration is insufficient when relying on a generic and anonymous telephone message.

ARGUMENT

I. STANDARD OF REVIEW

We review the factual findings underlying a district court's ruling on a motion to suppress for clear error and the legal conclusions *de novo*. *United States v. Vaughan*, 700 F.3d 705, 709 (4th Cir. 2012) (citation omitted). In doing so, we must construe the evidence in the light most favorable to the prevailing party. *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008). In accordance with the standard of review, the district court ruled correctly in granting Barker's motion to suppress evidence and this court should affirm.

CONCLUSION

For the reasons stated above, the decision of the United States District Court for the District of Maryland granting Barker's motion to suppress evidence for Fourth Amendment violations should be affirmed.

Respectfully submitted,

Jeffrey Abney, Esq.
Assist. Federal Public Defender
District of Maryland
100 S. Charles Street
Baltimore, MD 21201

Counsel for Appellee

REQUEST FOR ORAL ARGUMENT

Alex Barker submits that oral argument would aid the Court in its disposition of this appeal, and respectfully requests that oral argument be heard.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this day 9 April 2019, a copy of the foregoing Brief of Appellee was served by hand delivery on:

Charles Kelley, Esq.
Assistant United States Attorney
District of Maryland
36 S. Charles Street
Baltimore, MD 21201

Counsel for the Appellant

Jeffrey Abney, Esq.
Assist. Federal Public Defender
District of Maryland
100 S. Charles Street
Baltimore, MD 21201

Counsel for Appellee

Term: Fall 2019

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	506B	LW	ADVANCED LEGAL RESEARCH	B	1.000	3.00		
LAW	529A	LW	CON LAW II: INDIVIDUAL RIGHTS	C-	3.000	5.01		
LAW	536B	LW	CONSUMER PROTECTION SEM/COURSE	A	2.000	8.00		
LAW	553M	LW	SPECIAL TOPIC: LEGAL CAPITAL	C	1.000	2.00		
LAW	554B	LW	EMPLOYMENT LAW	B+	3.000	9.99		
LAW	572G	LW	BUSINESS ASSOCIATIONS	B+	3.000	9.99		
LAW	599B	LW	LAW IN FILM SEMINAR	A-	3.000	11.01		

Term Totals (School of Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	16.000	49.00	3.06
Cumulative:	48.000	48.000	48.000	48.000	151.92	2.96

Unofficial Transcript

Term: Spring 2020

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	501B	LW	ADMINISTRATIVE LAW	P	3.000	0.00		
LAW	515Q	LW	CONSUMER PROTECTION CLINIC	A	7.000	28.00		
LAW	578B	LW	EVIDENCE	P	3.000	0.00		

Term Totals (School of Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	13.000	28.00	2.80
Cumulative:	61.000	61.000	61.000	61.000	179.90	2.95

Unofficial Transcript

TRANSCRIPT TOTALS (SCHOOL OF LAW) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	61.000	61.000	61.000	61.000	179.90	2.95
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	61.000	61.000	61.000	61.000	179.90	2.95

Unofficial Transcript

Applicant Details

First Name	Erica
Last Name	Agbokou
Citizenship Status	U. S. Citizen
Email Address	erica.agbokou@slu.edu
Address	<div>Address</div> <div>Street</div> <div>13087 Fox Haven Court</div> <div>City</div> <div>Florissant</div> <div>State/Territory</div> <div>Missouri</div> <div>Zip</div> <div>63033</div> <div>Country</div> <div>United States</div>
Contact Phone Number	3147576562

Applicant Education

BA/BS From	Iowa State University
Date of BA/BS	December 2017
JD/LLB From	Saint Louis University School of Law
	https://www.slu.edu/law/index.php
Date of JD/LLB	May 20, 2021
Class Rank	50%
Law Review/Journal	Yes
Journal(s)	The Saint Louis University Law Journal
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
--------------------------------------	----

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Walker, Anders
anders.walker@slu.edu
3142616163
Cohn, Erika
erika.cohn@slu.edu
(314) 977-2759

References

Micheál Grace
mgrace@mhc.ie +353 1 614 5804
Professor Cohn
erika.cohn@slu.edu (314) 977-2759
Professor Canfield
paige.canfield@slu.edu 314-977-3476

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Erica Agbokou

13087 Fox Haven Court Florissant, Missouri 63033 | Cell: (314) 757-6562 | Email: erica.agbokou@slu.edu

The Honorable Elizabeth W. Hanes
Spottswood W. Robinson III and
Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

My name is Erica Akofa Agbokou and I am a third-year law student and Communications Editor on the *Saint Louis University Law Journal*. Please accept this letter and enclosed materials as my application for the 2021- 2023 Term.

I would love to clerk for you and learn from your experience as both a judge and future mentor. As a first-generation college student, and the first one to go to law school within my family, I have faced many barriers to the legal profession, however, my journey through law school has given me the opportunity to explore different avenues of law, and it has solidified my desire to clerk for you at the United States District Court for the Eastern District of Virginia.

Currently I am an extern at Tom Lange Company International, Inc. where I write memoranda on various aspects of law based upon research needs, draft employment and contractual agreements, and aid in the various legal matters of the company. Over the past two years I have worked to refine my legal research and writing skills. This summer I was a Faculty Fellow for Professor Wagner working on preparing memorandums and documents relating to corporate and securities laws where I drafted memoranda and conducted research pertaining to international corporate law. During the past year I was a faculty fellow for the Center for International and Comparative law, and just this last semester I was a law clerk at the Simon law firm. In each position I was tasked with doing extensive research while having the ability to refine my organization and time management skills. My law school course selection reflects many classes that I believe would be beneficial in my work as a clerk including Criminal Procedure, Federal Courts, Constitutional Law I & II, and Evidence. I believe my various experiences, classes and my position as an editor on the law journal, have prepared me to work collaboratively with other clerks and contribute meaningfully to your chambers. I can assure you I will work hard to produce quality work product for you.

I have enclosed my application materials for your review. Letters of recommendations from Professor Cohn and Professor Walker will be attached as well. Thank you for reviewing my application and I look forward to hearing from you.

Sincerely,

Erica Agbokou

Erica Agbokou

Erica Agbokou

13087 Fox Haven Court Florissant, Missouri 63033 | Cell: (314) 757-6562 | Email: erica.agbokou@slu.edu

Education:

Saint Louis University Law

St. Louis, MO

J.D., anticipated, May 2021

Honors/ Activities: Dean's Scholar Scholarship Recipient, Saint Louis University Law Journal (Communications Editor), Student Bar Association (Honor Council Judge), International Law Student Association (*IL Rep, Publicist, Vice President [current]*), Black Law Student Association (Casino Night Co-Chair), Woman's Law Student Association, *SLU Law Ambassador*.

Certificates: Anticipated Certificate in International and Comparative Law Spring 2021.

Iowa State University

Ames, IA

B.S., Animal Science and International Agriculture

Dec. 2017

Honors: Dean's List (Fall 2017); College of Agriculture and Life Science Dean's Study Abroad Leadership Scholar.

Activities: Women in Science and Engineering; Pre- Law Club (Vice President 2017; Secretary 2016), Alpha Omicron Pi International Fraternity.

St. Charles Community College

St. Charles, MO

General Education

Jan. 2013- May 2014

University of Central Missouri

Warrensburg, MO

Biology

Aug. 2012- Dec. 2012

Study Abroad

Madrid SLU Summer Law Program

Madrid, Spain

Summer Classes

May- June 2019

Classes: European Human Rights Law, Intellectual Property in Crisis, Introduction to the Civil Law System, Health Trade and National Security.

Middlesex University

London, England

The Theory of International Politics

July 2015

University College Dublin

Dublin, Ireland

Undergraduate studies

Aug. 2015- Dec. 2015

Language Skills

Ewe (Understanding [fluent], Conversational [intermediate])

Work Experience:

Tom Lange Company, Inc

St. Louis, MO

Legal Extern.

Fall 2020- ongoing

- legal research focused on areas of contract, business and employment/HR;
- drafting agreements for employment, off-boarding and contractual obligations reminders;

- writing memoranda on various aspects of law based upon the research needs of Company business;
- reviewing and updating COVID-19 policies/procedures as may be needed time-to-time given state or local ordinances;
- drafting agreements for business related sales relating to domestic and international product;
- observing and participating in conference calls and discussions/meetings surrounding legal matters of the Company;
- assist in some employment law/HR areas of Company needs;
- participating in contractual agreement talks; and
- reviewing, analyzing, or categorizing information in legal documents

SLU Law Faculty Fellow

St. Louis, MO

Faculty Fellow for Professor Wagner.

Summer 2020- ongoing

- aiding in research relating to Securities Regulation and Corporate Due Diligence.
- working on articles and ensuring citations are correct and in the right bluebook format.
- Writing memoranda on topics relating to the definition of a security and security regulation.

The Simon Law Firm, P.C.

St. Louis, MO

Law Clerk in Medical Malpractice and Personal Injury.

Spring 2019

- Writing memorandums on case law and medical malpractice cases
- Summarizing medical records
- Reviewing medical documents
- Case law research and summaries

SLU Law Faculty Fellow

St. Louis, MO

Center for International and Comparative Law.

Fall 2019- ongoing

- aiding professors in research for the Center of International and Comparative Law.
- working on articles and ensuring citations are correct and in the right bluebook format.

Mason Hayes & Curran

Dublin, Ireland

Summer Intern

July 2019- Aug. 2019

Financial Services Department.

- drafting memorandums
- reviewing financial agreements and contracts.
- conducted and compiled research to write a brief on the No Consent, No Sale Bill 2019 that was sent to clients.
- aiding the Real Estate team on a project in addition to other tasks relating to loan portfolio sales.

YSS Kid's Club

Ames, IA

Kid's Club Assistant

Sept. 2017- May 2018

- Curriculum planning and childcare for children ages 4-10.

Victoria's Secret

Des Peres, MO

Sales Associate

Aug. 2013- Aug. 2018

- Part time and seasonal associate while in undergraduate school.

Erica Agbokou
Saint Louis University School of Law
Cumulative GPA: 3.138

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure I	Jordan	B-	2	
Contracts I	Bodie	B	3	
Criminal Law	Branham	B-	3	
Introduct to Legal Studies I	Micelli	P	0.5	
Legal Research and Writing I	Sanner	B-	3	
Torts	Wilson	B	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure II	Jordan	B-	3	
Constitutional Law I	Walker	B-	3	
Contracts II	Bodie	B	2	
Introduct to Legal Studies II	Micelli	P	P	
Legal Research and Writing II	Sanner	B	3	
Property	Eppinger	A-	4	

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
European Human Rights Law	Baracio Iniesta	A-	2	
Health, Trade and National Security	Watson	B+	2	
Intellect Prop in Crisis	Cohn	B+	1	
Intro/Civil Law Systems	Torron	B+	1	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Associations	Fogel	B+	4	
Evidence	Stewart	B+	4	
International Law	Eppinger	B+	3	
Law Journal	Flanders	P	1	
Legal Profession	Vossemeier	A-	3	
Sem: Int'l Intel Prop Law	Cohn	B	2	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
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Criminal Procedure Survey	McGraw	P	3
International Business Transactions	Johnson	P	3
Law Journal	Flanders	P	2
Securities Regulation	Wagner	P	3
Trademark and Unfair Competition	Cohn	P	3

Due to the COVID-19 pandemic, Saint Louis University's School of Law adopted a mandatory 'Pass/No Pass' grading policy for all Spring 2020 semester courses. Grades for all Spring 2020 semester courses are not calculated into students' cumulative grade point averages. Accordingly, Dean's List honors and Academic Restrictions were suspended for the Spring 2020 semester.

Summer 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Client Counseling	McGinnis	A-	1	
Constitutional Law II	Walker	B	3	
Lawyering Practice	McGinnis	B+	3	

Grading System Description

The mean (average) of the grades assigned in first year core curriculum classes (not including any failing grades) must fall between 2.700 and 2.900.

2. The aggregate number of A+, A and A- grades should not be fewer than 5% of the class or more than 15% of the class.

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C. UpperDivisionGradingStandards

1. Upper Division courses with sixteen or more students

a. The mean (average) of the grades assigned in the class (not including any failing grades) must fall between 2.750 and 3.250.

b. The aggregate number of A+, A and A- grades should not be fewer than 5% of the class nor more than 15% of the class.

September 13, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Erica Agbokou for a federal clerkship. I got to know Erica over the course of the 2019-2020 academic year (before the pandemic) while supervising her note "Going up in Smoke: A Comparative Analysis of the FDA Proposed Rule Requiring Graphic Warning Labels on Cigarette Cartons." Erica proved herself to be a strong writer, and was a pleasure to work with. Her piece argued persuasively that the FDA's new proposed rule for tobacco packaging serves a compelling government interest and is likely to survive any foreseeable challenge on constitutional grounds.

I also worked with Erica over the summer of 2020, during the height of the lockdown, and was impressed with her work ethic and resolve. We met three times a week on zoom to go over Constitutional Law II (along with a class of about 20 students). While some struggled to keep up with the online meetings and assignments, Erica was consistently prepared and able to discuss complex cases and issues with ease.

I am confident that Erica would make an excellent clerk. If you have any questions about her candidacy, please do not hesitate to contact me at anders.walker@slu.edu or (314) 261-6163.

Cordially,
Anders Walker
Lillie Myers Professor of Law
Saint Louis University School of Law

Anders Walker - anders.walker@slu.edu - 3142616163

September 13, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is with great enthusiasm that I write this letter of recommendation in support of Erica Agbokou.

Erica was a student in three of the courses I teach at SLU LAW. In the summer of 2019, Erica took the Intellectual Property Law in Crisis course that was offered as part of the study abroad program in Madrid. In the fall of 2019, Erica enrolled in International Intellectual Property Law. In the spring of 2020, Erica took Trademark and Unfair Competition Law. In all three courses, Erica distinguished herself from her peers. Erica made frequent and thoughtful contributions to class discussions. She asked questions that demonstrated both an understanding of the course material and a natural curiosity to go beyond what was required. The classroom experience was significantly improved because of Erica's participation, and I expect that she will bring the same high level of engagement to a clerkship.

Erica's research and writing abilities are also noteworthy. The International Intellectual Property Law course was offered as a seminar and included a substantial research and writing requirement. After being intrigued by the topic in Madrid, Erica decided to write on Geographical Indications. Erica formulated and followed a strong research plan. She sought out and reflected on feedback provided on her first draft. Because of her effort and skill, Erica produced an insightful and polished final paper. Erica's research and writing skills will be valuable in the clerkship setting.

Another important quality Erica possesses is that she responds well to challenges. The spring semester Trademark course was particularly difficult due to COVID-19 and the need to abruptly shift from traditional in-person classes to an entirely remote environment. Erica handled this transition exceptionally well and her strong class contributions continued even though live attendance was no longer required. The course assessments included a written midterm memo assignment and a final exam. Both of Erica's submissions were organized, thorough, and demonstrated mastery of the subject matter. Although Erica does not have a letter grade to display due to the School of Law's decision to move to a Pass/No Pass grading system for the semester, I attest that Erica completed the course with distinction. Erica's demonstrated ability to successfully manage challenges will undoubtedly serve both her and the court well during a clerkship.

As her academic, employment, and extracurricular records demonstrate, Erica has a strong work ethic, is passionate about the law, and has much to offer future employers, colleagues, and clients. It is without reservation that I recommend Erica for a clerkship. If you have any questions or need further information, please contact me.

Sincerely,

Erika I. Cohn, JD, MLS
Professor of Law
Director, Vincent C. Immel Law Library
erika.cohn@slu.edu

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HERNANDEZ AND RODRIGUEZ: “DAMAGES OR NOTHING” APPLYING THE BIVENS DOCTRINE

I. INTRODUCTION

Chief Justice Marshall’s quote from *Marbury v. Madison* is a common thread throughout *Bivens* cases.¹ It states, “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”² Utilizing this quote, the Supreme Court in *Bivens* held federal courts have the power to award damages for violation of constitutionally protected interests.³ A *Bivens* cause of action lies when certain constitutional violations occur and the remedy is either “damages or nothing.”⁴

In 2018, *Rodriguez v. Swartz* and *Hernandez v. Mesa* were decided. These two cases, with what seem like identical fact patterns, had two very different applications of the *Bivens* doctrine which resulted in a circuit split.

Sergio Hernandez was a 15-year-old Mexican citizen with no U.S. ties.⁵ On June 7, 2010, he was playing on the Mexican side of a culvert that marks the boundary between Mexico and Texas when Agent Mesa, while on United States soil, fired several shots towards him and his friends⁶ and he was fatally wounded.⁷ Hernandez’s parents alleged claims in a federal lawsuit against Agent Mesa, other Border Patrol officials, several federal agencies, and the United States government.⁸ The Federal District Court

¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980); *Bush v. Lucas*, 462 U.S. 367 (1983); *Hernández v. Mesa*, 885 F.3d 811 (5th Cir. 2017); *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018); *Ashcroft v. Iqbal*, 556 U.S. 662 (2008); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

² 5 U.S. 137, 163 (1803).

³ *Bivens*, 403 U.S. at 399.

⁴ *Rodriguez*, 899 F.3d 719, 734-36.

⁵ *Hernandez*, 885 F.3d 811, 814.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

dismissed all claims but one.⁹ A *Bivens* claim against Agent Mensa on the Fifth Amendment was allowed to continue.¹⁰ The plaintiffs in *Hernandez* alleged Agent Mensa used deadly force without justification against Hernandez, violating his Fourth and Fifth Amendment rights, when the fatal shot was fired across the international border.¹¹

The Fifth Circuit concluded the claim could not continue because Agent Mensa had qualified immunity.¹² ¹³ *Hernandez* was sent back from the United States Supreme Court after it granted certiorari, requesting the Fifth Circuit to consider the propriety of allowing *Bivens* claims to proceed in light of Abbasi's analysis.¹⁴ Following the Supreme Court's orders, the Fifth Circuit still held a *Bivens* cause of action did not lie, because extending *Bivens* would interfere with separation of powers, it would flout Congress's refusals to provide damage remedies for aliens injured abroad, and would create a remedy with uncertain limits.¹⁵

Similarly, in *Rodriguez*, the decedent was also shot while he was on the Mexican side of the border.¹⁶ Lonnie Swartz, while standing on the U.S. side of the border, shot between 14 and 30 bullets at 16-year-old J.A. who was walking down Calle Internacional.¹⁷ ¹⁸ J.A. had family members that lived on the U.S. side of the border but never visited himself.¹⁹ J.A.'s mother sued Lonnie Swartz for money damages claiming a

⁹ *Id.*

¹⁰ *Hernandez*, 885 F.3d at 814.

¹¹ *Id.* at 815.

¹² *Id.*

¹³ (qualified immunity being "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights.").

¹⁴ *Id.*

¹⁵ *See id.* at 823.

¹⁶ *Rodriguez*, 899 F.3d at 727.

¹⁷ *Id.*

¹⁸ (Calle Internacional is a main street lined with commercial and residential buildings. The American side is on high ground, atop a cliff/ rock wall that rises from the level of the street. Families live on both sides of the border, and people go from one side to the other to visit and shop.)

¹⁹ *Id.*

violation of her son’s Fourth Amendment rights, and a violation of his Fifth Amendment rights.²⁰ Swartz moved to dismiss the complaint based on qualified immunity but conceded the fact that Rodriguez had a *Bivens* cause of action under the Fourth Amendment.²¹

The district court held that Swartz was not entitled to qualified immunity on the Fourth Amendment claim, because the shooting was treated as a “seizure” under the Fourth Amendment, so the court dismissed the Fifth Amendment claim.²² Swartz filed this interlocutory appeal to challenge the district court’s denial of qualified immunity.²³ The Ninth Circuit held the agent violated a clearly established constitutional right and is thus not immune from suit.²⁴ They also held the mother had a cause of action against the agent for monetary damages because there was no reason to infer that Congress deliberately chose to withhold a remedy, and the asserted special factors either do not apply or counsel in favor of extending *Bivens*.²⁵

II. HISTORY

A. Looking for a Solution

Bivens is the starting point of cases that deal with individuals who have had their constitutional rights violated by federal officials. Agents of the Federal Bureau of Narcotics under federal authority, entered Biven’s apartment and arrested him for alleged narcotics violations.²⁶ The agents confined him in front of his wife and children,

²⁰ *Id.*

²¹ *Id.*

²² Rodriguez, 899 F.3d at 727-728.

²³ *Id.* at 728.

²⁴ *Id.*

²⁵ *Id.* at 748

²⁶ Bivens, 403 U.S. at 389.

threatened the entire family, and searched the apartment.²⁷ At the federal courthouse he was interrogated, booked, and subjected to a visual strip search.²⁸ The true question was, whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands.²⁹ The Court held that there is no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.³⁰ The Court may, when legal rights have been violated, use *any* available remedy to make good the wrong done.³¹

Bivens was further expanded in *Davis v. Passman* and *Carlson v. Green*. In *Davis*, the court held *Bivens* could be extended to a Fifth Amendment Due Process claim.³² Davis brought a *Bivens* claim against a U.S. Congressman for Louisiana claiming he discriminated against her on the basis of sex.³³ The Court noted, in appropriate circumstances a federal district court may provide relief in damages for the violation of constitutional rights if there are no special factors counselling hesitation in the absence of affirmative action by Congress.³⁴

Carlson v. Green also led to an extension of *Bivens* claims.³⁵ In *Carlson* the decedent's mother brought an Eighth Amendment claim alleging the prison guards used cruel and unusual punishment, and as a result her son died.³⁶ The Court noted, *Bivens*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 402.

³⁰ *Id.*

³¹ *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 777 (1946)).

³² *Davis*, 442 U.S. at 234

³³ *Id.* at 228.

³⁴ *Id.* at 245.

³⁵ 446 U.S. at 25.

³⁶ *Id.* at 16.

may be defeated if the defendants demonstrate special factors counseling hesitation in the absence of affirmative action by Congress, and when defendants show Congress has provided an alternative remedy.³⁷ While there were no special factors, the Court did allow a FTCA claim and *Bivens* claim to proceed.³⁸ It reasoned, the Congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel complimentary causes of action, and *Bivens* would be more effective when it came to remedies.³⁹

Carlson notes, *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.⁴⁰ This has been seen as problematic in the eyes of more current benches that have seen *Bivens* claims.

B. Strictly Against Expansion

Bush v. Lucas and *Ziglar v. Abbasi* are cases that caution against the use of *Bivens*. Bush was an aerospace engineer who claimed his First Amendment rights had been violated.⁴¹ The Court found that *Bivens* did not apply in this instance because there was an alternative remedy under the current regulations made by congress.⁴² It included a right to appeal to the Civil Service Commissions Federal Employee Authority, which he did.⁴³ The Court denied “to create a new substantive legal liability without legislative

³⁷ *Id.* at 18.

³⁸ *Id.* at 19.

³⁹ *Id.* at 19-20.

⁴⁰ *Carlson*, 446 U.S. at 18.

⁴¹ *Bush v. Lucas*, 462 U.S. at 369.

⁴² *Id.* at 371.

⁴³ *Id.* at 371, 387.

aid” because they believe Congress is in a better position to decide whether or not the public interest would be served by creating it.⁴⁴

In *Ziglar v. Abbasi*, the Court lays out a full test to determine whether a *Bivens* claim has been satisfied. In *Abbasi*, the respondents were Arab and Muslim men detained after September 11, 2001.⁴⁵ They claimed there were horrible prison conditions and they were subjected to a pattern of “physical and verbal abuse.”⁴⁶ A suit was brought against three high executives in the Department of Justice and two of the wardens at the detention facility.⁴⁷ The Court denied their *Bivens* claims and stated, “it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.”⁴⁸ Furthermore, expanding the *Bivens* remedy is now a “disfavored” judicial activity.⁴⁹

III. ANALYSIS

A. The Circuit Split

The Court set out a framework for determining whether a claim of constitutional violation calls for a *Bivens* remedy.⁵⁰ Before beginning any analysis, the Court must determine whether a constitutional right exists to assess if a *Bivens* analysis is even required.⁵¹ Then the Court can move on to the first true step in the analysis which is determining whether the case before it is a new context.⁵² A case presents a new context whenever it differs in a meaningful way from previous *Bivens* cases decided by the

⁴⁴ *Id.* at 390.

⁴⁵ *Abbasi*, 137 S. Ct. at 1853.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1851.

⁴⁸ *Id.* at 1856.

⁴⁹ *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. at 675).

⁵⁰ *Rodriguez*, 899 F.3d at 729.

⁵¹ *Id.*

⁵² *Abbasi*, 137 S. Ct. at 1876.

Supreme Court.⁵³ If there is a new context then the Court asks whether there are any alternative remedies to convince the judicial branch to refrain from providing a remedy in damages.⁵⁴ If there are no alternate remedies the Court asks whether there are any special factors counseling hesitation.⁵⁵ Special factors are looked at in terms of the special fact alleged in the complaint or surrounding the case itself for example.⁵⁶ Both *Rodriguez* and *Hernandez* follow this analysis to determine whether or not the plaintiffs can assert *Bivens* actions.

1. Rodriguez v. Swartz

Using the analysis taken from *Abbasi* the Court in *Rodriguez* determined there was a *Bivens* action. In *Rodriguez*, citing *Boumediene*,⁵⁷ the Court stated it must examine J.A.’s citizenship and status, the location of the shooting, and any practical concerns that arise in determining whether the constitution applies.⁵⁸ It noted while Swartz was in the United States when he shot at J.A. who was on the Mexican controlled street, J.A. had a right to be free from the unreasonable use of deadly force.⁵⁹ As a result, it moved on to determine that the case did present a new context so they may only extend *Bivens* if the plaintiff has no other alternative remedies and there are no special factors.⁶⁰ Even though an alternative remedy need not be perfectly congruent or comprehensive, it still must be adequate.⁶¹ The situation for Rodriguez, however, was “damages under *Bivens* or nothing” considering all of his likely avenues of remedy were inadequate.⁶² There were

⁵³ *Rodriguez*, 899 F.3d at 738.

⁵⁴ *Abbasi*, 137 S. Ct. at 1876.

⁵⁵ *Id.*

⁵⁶ *Rodriguez*, 899 F.3d at 744.

⁵⁷ *Id.* at 729-30 (citing *Boumediene v. Bush*, 553 U.S. 723, 766 (2008)).

⁵⁸ *Id.* at 729.

⁵⁹ *See id.* at 731.

⁶⁰ *Id.* at 738.

⁶¹ *Rodriguez*, 899 F.3d at 739.

⁶² *Id.* at 744.

no special factors because there would be no foreign policy implications, or any presumptions against extraterritorial remedies.⁶³ The actions of Swartz touched and concerned the territory of the United States.⁶⁴ As a result, a *Bivens* Fourth Amendment action lied here.⁶⁵ The dissent however, like the majority in *Hernandez*, believed the decision of whether damages should be awarded should be left to Congress.⁶⁶ “The majority is failing to heed the Supreme Courts warning that *Bivens* is disfavored and that courts may not run ‘roughshod’ across the separation of powers.”⁶⁷

2. *Hernandez v. Mesa*

The *Hernández* majority asserted the plaintiff can prevail on a due process violation only if the court accepted two novel theories.⁶⁸ The first theory would allow a Fifth Amendment due process claim because *Verdugo* may prevent a comparable Fourth Amendment Claim.⁶⁹ The plaintiffs claimed a Fourth and Fifth Amendment violation when Agent Mensa used deadly force without justification.⁷⁰ The Court allowed the Fifth Amendment claim to continue.⁷¹ The Court in *Hernandez* moved straight into the analysis to determine the case did present a new context because there were meaningful differences between this case and prior *Bivens* claims, as well as claims alleged in *Abbasi*.⁷² Despite a close parallel to *Carlson*, even a modest extension of *Bivens* is still an extension.⁷³ The differences here were the constitutional rights being alleged, the extent of judicial guidance for how an officer should respond, and the risk of intruding on the

⁶³ *Id.* at 747-48.

⁶⁴ *Id.* at 748

⁶⁵ *Id.*

⁶⁶ *Id.* at 749; *Hernandez*, 885 F.3d at 820.

⁶⁷ *Rodriguez*, 899 F.3d at 754.

⁶⁸ *Hernandez*, 885 F.3d at 817 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75).

⁶⁹ *Id.*

⁷⁰ *Id.* at 815.

⁷¹ *Id.* at 814.

⁷² *Id.* at 816.

⁷³ *Hernandez*, 885 F.3d at 816.

separation of powers.⁷⁴ Additionally, there are special factors that cause the Court to hesitate before extending *Bivens*.⁷⁵ *Abbasi* instructs courts to concentrate on whether the judiciary is well suited, absent Congressional action or instruction, to consider and weigh the costs and benefits of allowing damages actions to proceed.⁷⁶ The Court determined deciding in favor of *Bivens* could threaten national security given border control policies are of crucial importance to national security.⁷⁷ Additionally, it also risks interference with foreign affairs and diplomacy because these are delicate diplomatic matters.⁷⁸ Therefore, it would be overstepping the Courts separation of powers boundaries by allowing a *Bivens* action to proceed because issues like the one in this case should be committed to those who write laws rather than those who interpret them.⁷⁹

B. Analysis of the Circuit Split

In two very similar situations the Ninth and Fifth Circuit have made two very different decisions. Decisions that may shape the future considering the current atmosphere surrounding the United States-Mexican border. *Rodriguez* came to a decision that leans more towards addressing constitutional rights, while *Hernandez* came to a conclusion that ignores the reason *Bivens* actions were allowed in the first place.

One of the Fifth Circuit's main faults is its analysis of *Abbasi* as addressed in the dissent. The Court essentially did not address the fact that the case was against one federal officer who engaged in his duties within the United States and shot into Mexico.⁸⁰ The dissent notes *Abbasi* provided a remedy for this case specifically because it is an

⁷⁴ *See id.*

⁷⁵ *Id.* at 818.

⁷⁶ *Id.*

⁷⁷ *Id.* at 819.

⁷⁸ *Hernandez*, 885 F.3d at 819-20.

⁷⁹ *Id.* at 820.

⁸⁰ *Id.* at 825.

instance of individual law enforcement overreach.⁸¹ Unlike *Abbasi*, where the individuals were trying to alter policies and hold executive officers liable for their subordinates, the plaintiff in *Hernandez* was suing a single officer, this is the key difference.⁸²

Rodriguez got the issue right when they allowed a *Bivens* claim against a single border patrol officer.⁸³ *Rodriguez* is distinguishable from *Verdugo* because unlike the agents in that case, Swartz, as well as Mesa acted on American soil.⁸⁴ Both cases were about shootings that occurred on American soil with the harm occurring on Mexican soil. This, however, should not be the determinate factor when it comes to administering justice in senseless shootings. If any of these cases are taken to the Supreme Court, it is likely that *Rodriguez* will prevail given its logic.

IV. CONCLUSION

Given the history of *Bivens* causes of actions, and the reputation it has in the courts today, it is possible that the Supreme Court may side with *Hernandez*. However, given the fact that the Supreme Court remanded *Hernandez* back to the Fifth Circuit to decide the case in relation to *Abbasi*, they may in fact find *Rodriguez*'s reasoning is sounder. *Rodriguez* goes to great lengths to show that even when there may be a new context, everything else can point to the need for the Court to provide relief to those who have had their constitutional rights violated. It may also note that Congress' silence on the matter may in fact show they are for the use of *Bivens* in cases like *Hernandez* and *Rodriguez*.

⁸¹ *Id.*

⁸² *Id.* at 826.

⁸³ *Rodriguez*, 899 F.3d at 731.

⁸⁴ *Id.* at 754; *Hernandez*, 885 F.3d at 829

Applicant Details

First Name	Brandon
Last Name	Akers
Citizenship Status	U. S. Citizen
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Contact Phone Number	3124839540

Applicant Education

BA/BS From	University of Chicago
Date of BA/BS	December 2016
JD/LLB From	Regent University School of Law
	http://www.regent.edu/acad/schlaw/
Date of JD/LLB	May 8, 2022
Class Rank	15%
Law Review/Journal	Yes
Journal(s)	Regent University Law Review
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Kohm, Lynne
lynnkoh@regent.edu
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brandon L. Akers

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June 2, 2021

The Honorable Elizabeth W. Hanes
United States District Court Eastern District of Virginia
701 E Broad St.
Richmond, VA 23219

Dear Judge Hanes:

I am a graduate of The University of Chicago and a rising third-year law student enrolled in Regent University School of Law's Honors Program. I would like to work for you beginning in August of 2022.

After interning for Judge Ludington and Judge Tarnow in the United States District Court of the Eastern District of Michigan, I developed a passion for the work clerks facilitate. I fervently enjoy a neutral approach of analysis: comparing plaintiff and defendant arguments against persuasive and binding authority to reach the proper conclusion.

During my second school year, I invested in my long-term goal of teaching. While earning 9th rank in my class, interning for the Virginia Court of Appeals, and editing law review articles, I helped 1Ls develop their legal research and writing skills as a teaching assistant.

I wish to work for you specifically because of the clarity with which you write your opinions. My goal is to write such that a client or *pro se* party may read my work product without counsel assistance. Your recent opinion, *Teresa v. Saul*, No. 3:19CV462 (E.D. Va. Aug. 17, 2020), meets my goal by outlining how the ALJ's failure to clarify ambiguities in the record necessitated remand. Additionally, I look to practice law and education in Richmond due to its proximity to family and Regent School of Law.

I would appreciate the opportunity to speak with you personally about this opportunity. I can arrange a trip to Richmond should you desire to schedule a personal interview or may be reached at (312) 483-9540. I look forward to hearing from you. Thank you for your consideration.

Sincerely,



Brandon L. Akers

Brandon L. Akers
 1800 Augusta Trail
 Edwardsville, IL 62025
 (312)-483-9540 · branake@mail.regent.edu

EDUCATION

Regent University: School of Law, Virginia Beach, VA

May 2022

Candidate for Juris Doctor

GPA: 3.65 Rank: 9/96

Honors: Book Award for *Wills, Trusts, and Estates*; Dean's Academic Merit Scholarship; Honors Program; Asian Pacific American Law Student Association (APALSA) IL Representative for 2019-2020

Activities: Law Review Staff Member for 2020-2021; Law Review Notes and Comments Editor-Elect for 2021-2022

Employment: *Legal Writing Fellow, Regent School of Law* **August 2020–**
 Provide teaching assistance to first year students in Legal Analysis Research and Writing. Hold office hours to answer legal writing questions, discuss research techniques, and review Bluebook exercises.

The University of Chicago, Chicago, IL

December 2016

B.S. in Public Policy and Psychology, graduated with General Honors

GPA: 3.65

Honors: Dean's List 2012-2016

Activities: *Vice President, Southside Scribblers*

January 2016–December 2016

Drafted lesson plans for extracurricular creative writing programs for grade and middle school children. Oversaw success of 8 student teachers and substituted as creative writing teacher when needed.

Employment: *Research Assistant, Harris School of Public Policy*

June 2016–December 2016

Transcribed over 90 hours of classroom observation footage and coded over 12,000 teacher-student interactions for behavioral and linguistic cues. Trained 3 incoming research assistants.

PROFESSIONAL EXPERIENCE

Roberts Wooten & Zimmer LLC., Hillsboro, MO

May 2021–August 2021

Summer Associate

Drafted court documents for general practice firm. Assigned cases concerned workers compensation, property, and family law.

Chambers of the Honorable Judge Huff, Court of Appeals of Virginia

September 2020–April 2021

Judicial Intern

Analyzed party briefs to produce memos. Assigned cases concerned domestic relations, workers compensation, and criminal law.

Chambers of the Honorable Judge Ludington, United States District Court

July 2020–August 2020

Judicial Intern

Wrote 5 draft orders. Orders concerned Motion for Remand, Motion for Certification of Judgement, Transfer of Venue, Motion for Summary Judgement, the Rehabilitation Act, and/or Compassionate Release.

Chambers of the Honorable Judge Tarnow, United States District Court

May 2020–July 2020

Judicial Intern

Wrote 2 memos and 2 draft orders. Writings concerned the Americans with Disabilities Act, Fair Credit Reporting Act, Motion for Summary Judgement, and/or Motion for Preliminary Injunction.

Dais Technology Inc., Chicago, IL

January 2018–July 2019

Operations Lead & Research Analyst

Facilitated a \$500,000 budgeted company move. Ensured the process complied with Chicago Construction Code. Drafted DAIS's Business Continuity Plan. Developed an Accounting Tool within Excel to justify tax credit claims.

Regent University [PROD]

Virginia Beach, VA 23464

Student No: B07355808

Date of Birth: 10-JAN-1994

Date Issued: 13-JUN-2021 OFFICIAL

Record of : Brandon L Akers

Current Name: Brandon L Akers

5792 Jake Sears Circle

Apt 104

Virginia Beach, VA 23464

Issued To : BRANDON AKERS

Course Level : First Professional Law

Matriculated: Fall 2019

Current Program

Degree : Juris Doctor

Program : J.D. - Juris Doctor

Major:

Law

Subj	No.	Title	Cred	Grade	Pts	R
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INSTITUTION CREDIT:**Fall 2019**

LAW	511	Christian Foundations of Law	2.00	A	8.00
LAW	521	Contracts I	3.00	A	12.00
LAW	541	Torts I	2.00	A-	7.34
LAW	551	Civil Procedure	2.00	B+	6.66
LAW	552	Legal Analysis, Research & Writing I	3.00	A	12.00
LAW	561	Property I	3.00	B+	9.99

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	15.00	55.99	3.73

Spring 2020

LAW	512	Foundations of Practice	1.00	P	0.00
LAW	522	Contracts II	2.00	A-	7.34
LAW	542	Torts II	3.00	A-	11.01
LAW	553	Legal Analysis, Research & Writing II	3.00	B+	9.99
LAW	554	Civil Procedure II	3.00	B+	9.99
LAW	562	Property II	3.00	A-	11.01

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	14.00	49.34	3.52

Fall 2020

LAW	602	Business Associations	3.00	A	12.00
LAW	652	Evidence	4.00	B+	13.32
LAW	662	Wills, Trusts, & Estates	3.00	A	12.00
LAW	683	Constitutional Law I - Constitutional Structure	3.00	B-	8.01
LAW	748	Academic Legal Scholarship	2.00	A	8.00
LAW	795	Externship: Judicial/Govt	1.00	P	0.00 I

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	15.00	53.33	3.55

Spring 2021

LAW	531	Criminal Law	3.00	A-	11.01
LAW	684	Constitutional Law II/Ind. Rights	3.00	A	12.00
LAW	691	Professional Responsibility	3.00	A-	11.01
LAW	763	Estate Planning	3.00	A	12.00
LAW	780P1	Professional Skills Practicum I	2.00	P	0.00
LAW	795	Externship: Judicial/Govt	1.00	P	0.00 I

Subj	No.	Title	Cred	Grade	Pts	R
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INSTITUTION CREDIT:

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	12.00	46.02	3.83

Fall 2021

LAW	563	Intellectual Property	3.00	In Prog	Course
LAW	621	UCC I	2.00	In Prog	Course
LAW	655	Negotiations	3.00	In Prog	Course
LAW	671	Individual Federal Income Taxation	3.00	In Prog	Course
LAW	757	Drafting Contracts	3.00	In Prog	Course

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
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TOTAL INSTITUTION	61.00	56.00	204.68	3.65
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TOTAL TRANSFER	0.00	0.00	0.00	0.00
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OVERALL	61.00	56.00	204.68	3.65
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-----END OF TRANSCRIPT-----

Donna Holcomb

Donna Holcomb, DSL
University Registrar

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Office of the University Registrar
Chicago, Illinois 60637

Name: Brandon Louis Akers
Student ID: 10426818



Scott C. Campbell, University Registrar

Undergraduate

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 12/09/2016
Degree Honors: With General Honors
Public Policy Studies (B.A.)
Psychology (B.A.)

Course	Description	Attempted	Earned	Grade
MATH 19520	Math Methods for Soc. Sci	100	100	A
PHSC 13500	Chemistry & The Atmosphere	100	100	A
SOSC 11100	Power, Identity, Resistance-1	100	100	A-
STAT 20000	Elementary Statistics	100	100	A

Autumn 2013

Academic Program History

Program: The College
Start Quarter: Autumn 2012
Current Status: Completed Program
Public Policy Studies (B.A.)
Psychology (B.A.)

Course	Description	Attempted	Earned	Grade
BUSF 30000	Financial Accounting	100	100	B
MATH 19620	Linear Algebra	100	100	B
PSYC 20600	Social Psychology	100	100	A
SOSC 11200	Power, Identity, Resistance-2	100	100	A

Winter 2014

Course	Description	Attempted	Earned	Grade
ECON 20000	Elements of Economic Analysis-1	100	100	B
PSYC 20700	Sensation And Perception	100	100	B-
SOSC 11300	Power, Identity, Resistance-3	100	100	A-
TAPS 10200	Acting Fundamentals	100	100	A

Spring 2014

External Education

Edwardsville Senior High School
Edwardsville, Illinois
Diploma 2012

Honors/Awards
DEANS LIST 2013-14

Beginning of Undergraduate Record

Autumn 2012

Course	Description	Attempted	Earned	Grade
BIOS 10130	Core Biology 2010	100	100	A
HUMA 11500	Philosophical Perspectives-1	100	100	A-
HUMA 19100	Humanities Writing Seminars	0	0	P
MATH 13100	Elem Functions And Calculus-1	100	100	A
SPAN 10300	Beginning Elementary Spanish-3	100	100	A
COLLEGE LANGUAGE REQUIREMENT COMPLETED				

Course	Description	Attempted	Earned	Grade
ECON 20100	Elements of Economic Analysis-2	100	0	W
GEOS 13400	Global Warming	100	100	B-
PSYC 20100	Psychological Statistics	100	0	W
PSYC 23000	Cultural Psychology	100	0	W

Autumn 2014

Course	Description	Attempted	Earned	Grade
PBPL 22300	Problems of Policy Implementation	100	100	B+
PSYC 20400	Cognitive Psychology	100	100	B
PSYC 20500	Intro To Developmental Psych	100	100	B
PSYC 25120	Child Development and Public Policy	100	100	B+

Spring 2015

Course	Description	Attempted	Earned	Grade
PBPL 22100	Politics And Policy	100	100	B+
PBPL 29800	Senior Seminar: Public Policy	100	100	A
PSYC 25101	The Psychology of Decision Making	100	100	A-
PSYC 25750	Psychology and Neurobiology of Stress	100	100	A

Autumn 2015

Spring 2013

Course	Description	Attempted	Earned	Grade
ECON 19800	Introduction To Microeconomics	100	100	A
HIST 13002	History of European Civilization-2	100	100	A-
HUMA 11700	Philosophical Perspectives-3	100	100	A
HUMA 19100	Humanities Writing Seminars	0	0	P
MATH 13300	Elem Functions And Calculus-3	100	100	A

Course	Description	Attempted	Earned	Grade
PBPL 22200	Public Policy Analysis	100	100	B
PSYC 20200	Psychological Research Methods	100	100	B-
PSYC 25700	Psychology of Negotiation	100	100	A
SOCI 20001	Sociological Methods	100	100	A

Winter 2016

Honors/Awards
DEANS LIST 2012-13

Date Issued: 03/27/2019

Page 1 of 2

KEY TO TRANSCRIPT ON FINAL PAGE

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Office of the University Registrar
Chicago, Illinois 60637

Name: Brandon Louis Akers
Student ID: 10426818



Scott C. Campbell, University Registrar

Undergraduate

Spring 2016

Course	Description	Attempted	Earned	Grade
PBPL 28805	Behavioral Economics and Policy	100	100	A-
SOCI 20140	Qualitative Field Methods	100	100	A
STAT 22000	Stat Meth And Applications	100	100	B

Honors/Awards

DEAN'S LIST 2015-16

Autumn 2016

Course	Description	Attempted	Earned	Grade
PSYC 27010	Psycholinguistics	100	100	A
PSYC 27950	Evolution and Economics of Human Behavior	100	100	A
SOSC 18100	Topics in Behavioral and Social Sciences Relevant to Medicine	100	100	A-

Undergraduate Career Totals

Cumulative GPA: 3.648 Cumulative Totals 4600 4300

End of Undergraduate

Date Issued: 03/27/2019

Page 2 of 2

KEY TO TRANSCRIPT ON FINAL PAGE

OFFICIAL ACADEMIC DOCUMENT



Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit <http://csl.uchicago.edu/policies/disclosures>.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

- I **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
- IP **Pass (non-Law):** Mark of I changed to P (Pass). See 8 for Law IP notation.
- NGR **No Grade Reported:** No final grade submitted
- P **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
- Q **Query:** No final grade submitted (College only)
- R **Registered:** Registered to audit the course
- S **Satisfactory**
- U **Unsatisfactory**
- UW **Unofficial Withdrawal**
- W **Withdrawal:** Does not affect GPA calculation
- WP **Withdrawal Passing:** Does not affect GPA calculation
- WF **Withdrawal Failing:** Does not affect GPA calculation
- Blank:** If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

- H Honors Quality
- P* High Pass
- P Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a

University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled *Pro Forma* does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

Revised 09/2016



The Honorable Judge
Via OSCAR

June 2, 2021

Re: Brandon Akers

Dear Your Honor,

Please accept this letter as a recommendation of Mr. Brandon Akers for a judicial clerkship position with your court. Based upon his work in my classes, supervising his law review student note, and my knowledge of him as a student inside and outside the classroom, I am very pleased to provide this letter of recommendation for him.

Mr. Akers is an exceptional writer, an excellent researcher, and a joy to work with. An Honors student with highly developed research and analytical skills, his is intentional with academic excellence. As his instructor in two large substantive classes and his law review note supervisor, I can speak to his impressive research and writing capabilities, and his tremendous ability to meet and exceed deadlines and objectives. As evidence of these facts, Mr. Akers earned the Book Award in my Wills, Trusts & Estates course last semester, achieving the highest grade in the class. He also excelled in our Professional Responsibility class, often volunteering for attorney ethics conundrum role plays, also achieving one of the highest grades in that class. In each class his assignments were always drafted a week in advance to give him ample time for rewriting and polishing of his work. In his law review note, Mr. Akers tackled two very unique and sensitive areas of law to advance financial support stabilization for disabled children during their parental divorce with special needs trusts using European legal models. His work was excellent, organized, and thoughtful. Combined with diligence and an amazing work ethic, he really is a joy to work with. To bring clarity to his intentionality, as a 1L Mr. Akers expressed interest in clerking on the federal district level. Last summer he completed two federal judicial internships back to back in the middle of the pandemic – excelling in both. In sum, his excellence all around will serve any court very well.

Without reservation, Mr. Brandon Akers receives my very highest recommendation. Should you require further information, please don't hesitate to contact me.

Very truly yours,

A handwritten signature in black ink that reads "Lynne Marie Kohm".

Lynne Marie Kohm

Christian Leadership to Change the World

Lynne Marie Kohm, Professor, Associate Dean and John Brown McCarty Professor of Family Law

lynnkoh@regent.edu

regent.edu/law

1000 Regent University Drive, Virginia Beach, VA 23464 | 757.352.4335 | Fax 757.352.4571 | 877.267.5072 |



June 11, 2021

Re: Recommendation for Brandon Akers, J.D. anticipated 2022

To Whom it May Concern:

I highly recommend Brandon Akers to serve as a law clerk. Brandon was a student in my Legal Analysis, Research, and Writing (LARW) I & II courses in 2019-20, and I supervised him as a Legal Writing Fellow in Regent's Legal Writing Program in 2020-21. Brandon distinguished himself early on as a student who is extremely self-disciplined, conscientious, and self-motivated, and he has continued to improve each semester. Brandon has been a delight to teach and mentor, and I believe he would be a wonderful addition to your chambers.

Brandon is an Honors student in the top ten percent of his class. As his grades and class rank indicate, Brandon is capable of conducting complicated legal research, engaging in complex legal analysis, and communicating those ideas thoroughly and clearly. His excellent research, analytical, writing, and communication skills resulted in his being selected to work with me and with my LARW students last year as a Legal Writing Fellow. Throughout the year, Brandon assisted me with various research projects and with evaluating student work product, and he held weekly office hours to meet with students requesting assistance with research, citation placement and format, analysis, and writing. Brandon performed extraordinarily well as a Fellow; he was an invaluable help to me, and my students benefitted greatly from his knowledge and guidance, as well as his approachable and pleasant demeanor. I recently was pleased to learn that Brandon has accepted my invitation to serve as a Fellow again this year despite also being selected to serve in an editorial role with the Regent Law Review. Both of these positions are demanding in terms of time and energy, but I am confident that Brandon will perform very well in both capacities. After all, he was a superb Fellow last year while simultaneously maintaining stellar grades and interning with Judge Huff of the Court of Appeals of Virginia!

Since he was a 1L, Brandon has expressed his desire to participate in a judicial clerkship after graduation. As a former federal law clerk, I discussed with him various ways to prepare for such a position. In addition to serving on the Law Review and interning for multiple state and federal judges, Brandon has continued to round out his resume and hone his legal skills in preparation for a clerkship by working in a private law office setting this summer.

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In sum, in addition to being gifted intellectually, Brandon is an earnest, mature, and personable young man with integrity. I recommend Brandon for this position without reservation. If you have any questions about this recommendation, please contact me at (757) 352-4689 or kimbvan@regent.edu.

Very truly yours,



Kimberly R. Van Essendelft
Assistant Dean of Student Affairs

Christian Leadership to Change the World

1000 Regent University Drive, Virginia Beach, VA 23464 | 757.352.4584 | Fax 757.352.4139 | 877.267.5072 | regent.edu

Court of Appeals of Virginia

GLEN A. HUFF
JUDGE



900 LASKIN ROAD
SUITE 102
VIRGINIA BEACH, VIRGINIA 23451

May 25, 2021

To Whom it May Concern:

I am pleased to write this letter of recommendation for Brandon Akers who clerked in my chambers for both semesters in the school year 2020-21. He successfully competed for the position and performed well throughout the internship. He worked in chambers researching issues and drafting bench memoranda for my use. Throughout his term Brandon proved to be strong in his legal research and analysis and was able to write cogent memoranda that were useful in my draft opinions.

Brandon demonstrated a genuine zeal for researching law, analyzing issues and writing clear explanations. He currently sits on the board of Regent University's Law Review and serves as its Notes & Comments editor. Akers is in the honors program at Regent and ultimately plans to teach law.

Brandon worked well in the office environment, made efficient use of his time, and always demeaned himself in a professional and ethical fashion. I recommend him without any hesitation or qualification.

Very truly yours,

A handwritten signature in black ink, appearing to read "Glen A. Huff", written over the typed name.

Glen A. Huff

Pursuant to Canon 2B of the Canons of Judicial Conduct for the State of Virginia, the opinions contained in this letter are personal and not an opinion of the Court of Appeals of Virginia.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
REDACTED

REDACTED,
Plaintiff,

v.

REDACTED,
Defendant.

REDACTED

UNITED STATES DISTRICT JUDGE
REDACTED

**OPINION AND ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGEMENT [30] AND
DENYING PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGEMENT [31]**

Plaintiff brings this case under the Fair Credit Report Act (“FCRA”), 15 U.S.C. §§ 1681o and §§ 1681n. Plaintiff alleges that her credit report tradeline, produced by Defendant, is inaccurate because it displays both a closed account status and a non-zero monthly payment balance. Since Plaintiff has requested Defendant change the non-zero monthly payment balance to zero and Defendant has not changed Plaintiff’s tradeline, Plaintiff alleges that Defendant has violated the FCRA negligently per 15 U.S.C. §§ 1681o and willfully per 15 U.S.C. §§ 1681n. On February 14, 2020, Defendant filed a Motion for Summary Judgement regarding both alleged violations. On February 18, 2020, Plaintiff filed a Motion for Partial Summary Judgement regarding only the alleged 15 U.S.C. §§ 1681o violation. For the reasons below, Defendant’s motion will be granted, and Plaintiff’s motion will be denied.

FACTUAL BACKGROUND

In either 2014 or 2015, Plaintiff filed for bankruptcy. (ECF No. 30-5, PageID.208). On December 7, 2015, Plaintiff procured a \$600 loan from Defendant. (ECF No. 30-2, 31-2). Plaintiff was to make six monthly payments: five of \$105.88 and one final payment of \$105.86. (*Id.*)

Between January and March of 2016, Plaintiff made three payments of \$105.88. (ECF No. 31-3, PageID.306). Then, Plaintiff failed to make further payments. (*Id.*) On October 6, 2016, Defendant “charged off” the account due to nonpayment. (ECF No. 31-2, PageID.296). When Defendant charged off Plaintiff’s account, Defendant accelerated the balance owed by Plaintiff such that the entire remaining debt was due. (ECF No. 30-3, 30-6, 31-2, PageID.297). By December 2017, Plaintiff fully paid the loan balance and no longer owed money to Defendant under this tradeline. (ECF No. 30-5, 31-2, PageID.210-211).

On July 28, 2018, Plaintiff obtained her credit reports from **REDACTED** and **REDACTED**. (ECF No. 30-4, 31-3, 31-4). The credit reports from both **REDACTED** and **REDACTED** included a tradeline documenting Defendant’s loan to Plaintiff. (*Id.*) The tradeline stated: the account was opened December 7, 2015; the scheduled monthly payment was \$105; the balance was \$79; and the account status is closed. (*Id.*)

In late 2018 and early 2019, Plaintiff attempted to obtain a mortgage through **REDACTED** and **REDACTED** but was denied. (ECF No. 30-5, PageID.207). Plaintiff testified that both mortgagees stated there were a “number of issues” on Plaintiff’s credit report. (*Id.*) Plaintiff testified that her filing for bankruptcy in 2014 or 2015 was still on her credit report when she applied for the mortgage. (ECF No. 30-5, PageID.208). Neither mortgagee expressed denying Plaintiff a mortgage due to a single tradeline. (ECF No. 30-5, PageID.207, 213). Plaintiff testified that both mortgagees requested more tradelines be added to her account. (ECF No. 30-5, PageID.207-208).

On January 14th, 2019, Plaintiff submitted letters to **REDACTED** and **REDACTED** which disputed credit report information the Defendant furnished. Both letters stated “You are reporting that I owe a scheduled monthly payment of \$105 . . . this is incorrect as the account . . . is closed . . . Please report the monthly payment as \$0.” (ECF No. 30-7, 31-5). Plaintiff did not receive dispute reports from **REDACTED** or **REDACTED**. On March 4, 2019, Plaintiff obtained her credit reports from **REDACTED** and **REDACTED** again. (ECF No. 31, PageID.280). The monthly payment amount listed in the credit reports remained unchanged. (ECF No. 31-8, 31-9).

PROCEDURAL BACKGROUND

On May 21, 2019, Plaintiff filed suit against Defendant for negligent failure to comply with the FCRA per 15 U.S.C. §§ 1681o and willing failure to comply per 15 U.S.C. §§ 1681n. Plaintiff filed the same allegations against **REDACTED** and **REDACTED**. On May 23, 2019, the Defendants removed this case from Wayne County Circuit Court. (ECF No. 1). On October 16, 2019, Plaintiff settled with **REDACTED**. (ECF No. 27). On February 13, 2020, Plaintiff settled with **REDACTED**. (ECF No. 29).

On February 14, 2020, the remaining Defendant filed a Motion for Summary Judgement to dismiss both claims. (ECF No. 30). On February 18, 2020, Plaintiff filed her Motion for Partial Summary Judgement on her 15 U.S.C. §§ 1681o claim (negligent violation of FCRA). (ECF No. 31). Both motions have been fully briefed, and a hearing was held on June 10, 2020.

LEGAL STANDARD

When filing a motion for summary judgement, the movant carries the initial burden to inform the court on the basis for the movant’s motion. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). The movant must also identify portions from the record that the movant believes demonstrate an

absence of a genuine issue of material fact. (*Id.*) If the movant is successful, then the nonmovant carries the burden to set forth specific facts which demonstrate a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). When deciding a motion for summary judgement, a court must view the evidence and draw all reasonable inferences in favor of the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ANALYSIS

Congress enacted the FCRA so that “consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit.” 15 U.S.C. § 1681(b). 15 U.S.C. § 1681s-2(b)(A) requires creditors who furnish information to consumer reporting agencies to “conduct an investigation with respect to the disputed information” whenever a consumer raises a dispute about the credit information the creditor provides. Further, 15 U.S.C. § 1681s-2(b)(E) requires furnishers of credit information to “modify,” “delete,” or “permanently block the reporting” of any disputed information that the investigation reveals to be “inaccurate.” Congress assigned these duties to limit the spread of inaccurate consumer credit information. *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 614 (6th Cir. 2012).

Consumers cannot bring suit against creditors for initial inaccuracies. *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 628 (6th Cir. 2018). Consumers do have a right of action when creditors either negligently fail to investigate and address inaccuracies per 15 U.S.C. §§ 1681o or willfully fail to do so per 15 U.S.C. §§ 1681n. (*Id.*) The consumer must show, in addition to a *per se* FCRA violation, that the violation resulted in injury in fact, which is traceable to a defendant’s conduct, and likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Here, Plaintiff fails to meet her burden because 1) Plaintiff fails to show that the tradeline in question is inaccurate, 2) Plaintiff fails to show the Defendant's alleged actions created an injury-in-fact, and 3) Plaintiff relies on inadmissible hearsay, the Credit Reporting Resource Guide, to show negligence in the Defendant's conduct.

Accuracy of the Tradeline

In order to recover under 15 U.S.C. §§ 1681n or 1681o, a consumer must demonstrate that the creditor furnished inaccurate information. *Spence v. TRW, Inc.*, 92 F.3d 380, 382 (6th Cir. 1996). When 15 U.S.C. §§ 1681n or 1681o claims refer to a violation of § 1681s-2(b) requirements, courts determine the accuracy of credit information under the “materially misleading” standard. *See Pittman*, 901 F.3d at 629–30, *Walker v. Equifax Info. Servs., LLC*, No. 2:19-cv-12257-SJM-APP, ECF No. 17, PageID.170-172 (E.D. Mich. May 1, 2020), and *Thompson v. Equifax Info. Servs., LLC*, No. 2:18-CV-12495-TGB, 2020 WL 806032, at *11 (E.D. Mich. Feb. 18, 2020). Under the materially misleading standard, the consumer may prove inaccuracy by showing that the credit report misled a creditor. *Pittman*, 901 F.3d at 630. The fact that a layperson could be misled or that the consumer was misled is insufficient. *Dickens v. Trans Union Corp.*, 18 Fed. Appx. 315, 318 (6th Cir. 2001). A plaintiff could alternatively provide evidence that a creditor would likely be misled, but such showing is “extremely difficult.” *Elsady v. Rapid Global Bus. Sols., Inc.*, 2010 WL 2740154, at * 7 (E.D. Mich. July 12, 2010).

Here, Plaintiff does not show that any creditor was misled. Plaintiff asserts that she was denied mortgages after her request to change the non-zero monthly payment balance on her tradeline. (ECF No. 32, PageID.400). However, Plaintiff does not present evidence that a creditor was misled by the non-zero monthly payment balance on her tradeline. During Plaintiff's deposition, Plaintiff stated the creditors informed her there were “a number of issues” with her

credit, requested she add more lines of credit, and did not specify a single tradeline as the reason behind their decision. (ECF 30-5, PageID.207, 213). Further, Plaintiff confirmed that her bankruptcy filing from 2014 or 2015 was still on her credit report and was “creating an issue” for her. (ECF 30-5, PageID.208). Since Plaintiff did not show that a creditor was misled by the non-zero scheduled monthly payment tradeline or that a creditor’s decision was based on the non-zero scheduled monthly payment balance rather than other issues with her credit, Plaintiff failed to show Defendant’s tradeline resulted in a creditor being misled.

Additionally, Plaintiff failed to show that the tradeline had the potential to mislead a creditor. Credit reports with a non-zero scheduled monthly payment balance and account status of “charged off and closed” have been found not to be materially misleading or factually inaccurate. *Walker*, No. 19-cv-12257, ECF No. 17 PageID.170-172. District courts in this circuit have found scheduled monthly payment fields to be historical and relay only what the monthly payment was before an account was charged off or closed. *See Walker*, No. 19-cv-12257, ECF No. 17, PageID.172 and *Thompson*, No. 2:18-CV-12495-TGB, 2020 WL 806032, at *11.

Since Plaintiff has not demonstrated the existence of a material fact as to whether the tradeline misled or could mislead a creditor, she is incapable of proving that the tradeline is materially misleading as a matter of law. Even taken in the light most favorable to Plaintiff, the tradeline is therefore not inaccurate within the meaning of 15 U.S.C. §§ 1681n and 1681o claims.

Injury-In-Fact

In order to recover for a credit reporter’s FCRA violations, consumers must show they suffered “an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Spokeo*, 136 S. Ct. at 1548. Therefore, Plaintiff cannot “allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-

in-fact requirement.” *Id.* at 1549. Tradelines which show a non-zero scheduled monthly payment balance and a closed or charged off account status have been found not to cause injuries-in-fact. *Thompson*, No. 2:18-CV-12495-TGB, 2020 WL 806032, at *1, 3-4.

Here, Plaintiff fails to show the Defendant’s conduct resulted in any concrete harm. Plaintiff asserts that she was denied mortgages after her request to change the non-zero monthly payment balance on her tradeline. (ECF No. 32, PageID.400). However, Plaintiff failed to show how the non-zero monthly payment balance resulted in adverse decisions from creditors who reviewed her credit history. (ECF No. 30-5, PageID.207-208, 213). Plaintiff also failed to show how the non-zero monthly payment balance would produce adverse decisions from these creditors, as opposed to her other credit problems such as filing for bankruptcy and having few lines of credit. (ECF 30-5, PageID.208). Therefore, independent of the tradeline’s accuracy, Plaintiff has not demonstrated how Defendant’s alleged conduct would have harmed her chances of obtaining credit.

Credit Reporting Resource Guide

Plaintiff relies on Credit Reporting Resource Guide (“CRRG”) requirements to assert that Defendant acted at least negligently. (ECF No. 31 PageID.279). The CRRG requires the monthly payment amount on closed or charged off accounts to be changed to zero. (ECF No. 31-6). Plaintiff cites *Gallaher v. US Bank Nat’l Ass’n*, No. 14-cv-1877, 2017 WL 2111593, at *7 (D. Conn. May 15, 2017) for the proposition that the CRRG is an industry standard.

Courts in this circuit have concluded that the CRRG is not dispositive on FCRA compliance. The CRRG is published by the Consumer Data Industry Association, and federal laws of commerce and trade, including the FCRA, do not mandate perfect compliance with CRRG. *Fulton v. Equifax Info. Servs., LLC*, No. 15-14110, 2016 WL 5661588, at *3 (E.D. Mich. Sept. 30,

2016). “The [*Gallagher*] court did not recognize the CRRG as the industry standard or conclude that compliance or non-compliance with its provisions was conclusive evidence of accuracy or inaccuracy.” *Thompson*, No. 2:18-CV-12495-TGB, 2020 WL 806032, at *11. The CRRG has not been considered when determining the accuracy of a tradeline with non-zero monthly payments. *Id.* Courts have held that CRRG requirements are inadmissible hearsay because CRRG’s guidelines are out-of-court statements by an industry group, because CRRG requirements have no statutory authority, and because the consumer did not provide expert witness testimony authenticating CRRG guidelines as industry standard. *Euring*, No. 19-CV-11675, 2020 WL 1508344, at *9.

Plaintiff’s argument parallels the consumer’s argument in *Euring* because both claim that non-zero monthly payment amounts on closed accounts depart from CRRG guidelines. However, just as the consumer in *Euring* did not proffer an expert witness to establish the CRRG guidelines as an industry standard, Plaintiff did proffer expert witness testimony to establish CRRG guidelines as an industry standard.

Plaintiff relies on *Lovelace v. Equifax Information Services, LLC*. In *Lovelace*, the plaintiff cited the CRRG in their argument concerning charged off accounts with non-zero monthly payment balances to deny a defendant’s motion to dismiss, and prevailed. *Lovelace v. Equifax Info. Servs. LLC*, No. CV-18-04080-PHX-DWL, 2019 WL 2410800, at *1 (D. Ariz. June 7, 2019). The *Lovelace* court denied the defendant’s motion because the defendant submitted a screenshot of the credit report, and the plaintiff raised that a screenshot is not evidence properly before the court. *Id.* at 2. In its opinion, the *Lovelace* court also noted that CRRG requirements alone were inadmissible for summary judgement analysis. *Id.* The court recommended the defendant refile their motion after properly attaching the relevant credit report. *Id.* at 4.

CONCLUSION

Plaintiff had the burden to prove that the evidence, taken in the light most favorable to her position, could reasonably be interpreted to show that her credit report tradeline—by virtue of displaying a charged off account status and non-zero monthly payment balance—misled another creditor and resulted in an injury-in-fact. Plaintiff failed to meet this burden because Plaintiff did not connect the non-zero monthly payment balance to a misguided action by another creditor or mortgagee. Plaintiff failed to show how the creditor’s decisions attributed to the non-zero monthly payment balance. Finally, Defendant’s noncompliance with the CRRG does not show negligence or willful misconduct in adherence to the FCRA.

Accordingly,

IT IS ORDERED that Defendant’s Motion to for Summary Judgement [30] is **GRANTED**. Plaintiff’s Motion to for Partial Summary Judgement [31] is **DENIED**.

SO ORDERED.

Applicant Details

First Name **Benjamin**
 Last Name **Alexander**
 Citizenship Status **U. S. Citizen**
 Email Address btalexander2@wisc.edu

Address

Address Street 811 Prospect Place, Apt. A City Madison State/Territory Wisconsin Zip 53703 Country United States

Contact Phone Number **2403052558**

Applicant Education

BA/BS From **Kenyon College**
 Date of BA/BS **May 2015**
 JD/LLB From **University of Wisconsin Law School**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=35002&yr=2009
 Date of JD/LLB **May 15, 2022**
 Class Rank **20%**
 Law Review/Journal **Yes**
 Journal(s) **Wisconsin Law Review**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial
Internships/ **No**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

Yablon, Robert
robert.yablon@wisc.edu
Fox, Ashby
akfox@wisc.edu
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References

Professor Ashby Fox
Legal Research & Writing Lecturer
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Jose German, Esquire
Assistant Federal Public Defender for the District of Columbia
Jose_German@fd.org
(202) 664-4458

Professor Robert Yablon
Associate Professor
robert.yablon@wisc.edu
(608) 890-0218

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Benjamin Alexander

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June 12, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and
Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year law student at Wisconsin Law School and Senior Managing Editor on the *Wisconsin Law Review*. I am writing to apply for a 2022–2024 term clerkship in your chambers. I am working this summer at the Federal Public Defender for the Western District of Pennsylvania, and last summer I worked at the Federal Public Defender for the District of Columbia. I am determined to pursue work as an Assistant Federal Public Defender in the future, and my keen interest in federal public defender work is a substantial motivation for seeking a clerkship with your chambers.

Enclosed please find my resume, law school transcript, and writing sample. The writing sample is a memorandum I wrote while interning in the office of the Federal Public Defender for the District of Columbia. It addresses the applicability of the United States Supreme Court's rule in *Brady v. Maryland* at the suppression hearing stage, and the viability of our client's due process claim for a motion to dismiss. I have received permission to use the memorandum as my writing sample and I have changed or redacted all identifying information to preserve the client's privacy and privilege. Arriving separately are letters of recommendation from Professor Robert Yablon and Professor Ashby Fox.

If there is any other information that would be helpful to you to consider my application, please let me know. Thank you for your consideration.

Respectfully,

Benjamin Alexander

Benjamin Alexander

Enclosures

Benjamin Alexander

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EDUCATION

University of Wisconsin Law School Madison, WI
Juris Doctor Candidate May 2022

GPA: 3.43 (Top 20%)
Activities: Senior Managing Editor, *Wisconsin Law Review*
Honors: *Legal Research & Writing* Spring 2020 Best Brief Competition, Semi-Finalist

Kenyon College Gambier, OH
Bachelor of Arts in Political Science May 2015

GPA: 3.35
Activities: Kenyon Men's Varsity Soccer, NCAA Tournament participant 2013–2014

EXPERIENCE

Federal Public Defender for the Western District of Pennsylvania Pittsburgh, PA
Legal Intern Summer 2021

Federal Public Defender for the District of Columbia Washington, DC
Legal Intern May 2020 – August 2020

- Researched and drafted motions for filing in federal criminal trials.
- Produced memos analyzing issues in criminal cases, including for immigration cases, human trafficking cases, and felon-in-possession cases.
- Strategized case theories with Assistant Federal Public Defenders.

KIPP DC Charter Schools Washington, DC
Lead Third Grade Teacher July 2018 – July 2019

- Lead classroom teacher for 26 third grade students representing seven of the eight wards within the District of Columbia.
- Directed classroom instruction in Math and English Language Arts.
- Collaborated with a grade team of four teachers to rank as the ninth highest achieving school in the District of Columbia on the 2019 PARCC Mathematics Assessment.

Success Academy Charter Schools Brooklyn, NY
Lead Third Grade Teacher June 2016 – July 2018

- Led all 53 students to pass the New York State Third Grade Common Core Mathematics Test over two school years.
- Organized and conducted monthly meetings with 53 families to tailor individualized academic plans to bolster student performance.
- Analyzed student test results to create monthly, individualized academic plans to eliminate educational gaps for 53 students.

Associate Third Grade Teacher September 2015 – June 2016

- Led instruction to prepare for the 2016 New York State Third Grade English Language Arts and Common Core Mathematics Tests.
- Collaborated with three other teachers to lead grade to be ranked first in the New York State Common Core Mathematics Test.
- Informally promoted to lead teacher in April 2016, assuming lead teacher responsibilities for remainder of the 2015–2016 school year.

INTERESTS

- Domestic politics and social equity issues, reading fiction and historical biography, travel, backpacking, painting and drawing, music, fitness, and sports



Course History Report for Benjamin Thomas Alexander

This document lists the courses, credits, and reported grades for the above-named student of the University of Wisconsin Law School during his/her current matriculation. This letter is not an official transcript and does not contain information concerning previous course work at the University of Wisconsin-Madison.

Fall 2019

Course #	Title	Instructor	Credits	Grade
714-003	Civil Procedure I	Mcdermott, Megan	4	B+
723-004	Legal Research and Writing	Turner, Andrew	3	B
726-003	Intro-Substan Criminal Law	Stevenson, Adam	4	A-
711-002	Contracts I	Sidel, Mark	4	A-

Semester: Credits: 15 GPA Credits: 15 GPA Points: 51.8 GPA: 3.45

Overall: Credits: 15 GPA Credits: 15 GPA Points: 51.8 GPA: 3.45

Spring 2020

Course #	Title	Instructor	Credits	Grade
715-003	Torts I	Mcdermott, Megan	4	SD
723-002	Legal Research and Writing	Fox, Ashby	3	SD
724-001	Property	Klug, Heinz	4	SD
725-001	Intro to Criminal Procedure	Klinge, Cecelia	3	SD

Semester: Credits: 14 GPA Credits: 0 GPA Points: 0 GPA: 0.00

Overall: Credits: 29 GPA Credits: 15 GPA Points: 51.8 GPA: 3.45

Fall 2020

Course #	Title	Instructor	Credits	Grade
940-008	Law of Democracy	Yablon, Robert	3	S
940-011	Race, Racism and the Law	Mitchell, Everett	2	S
899-001	Law Review	Findley, Keith	2	S
801-001	Evidence	Schwartz, David	4	A-
731-001	Constitutional Law I	Schwartz, David	3	B

Semester: Credits: 14 GPA Credits: 7 GPA Points: 23.8 GPA: 3.40

Overall: Credits: 43 GPA Credits: 22 GPA Points: 75.6 GPA: 3.44

Spring 2021

Course #	Title	Instructor	Credits	Grade
740-002	Constitutional Law II	Coleman, Franciska	3	B+
744-001	Administrative Law	Ohnesorge, John	3	A-
817-001	Business Organizations I	Ohnesorge, John	3	B
824-001	Federal Jurisdiction	Yablon, Robert	3	A-
899-001	Law Review	Findley, Keith	2	S

Semester: Credits: 14 GPA Credits: 12 GPA Points: 41.1 GPA: 3.43

SUMMARY: Credits: 57 GPA Credits: 34 GPA Points: 116.7 GPA: 3.43

Future Schedule Fall 2021

Course #	Title	Instructor	Credits	Grade
742-001	Taxation I	Schnur, Robert	4	
802-001	Civil Procedure II	Varsava, Nina	3	
850-001	Professional Responsibilities	Varsava, Nina	3	
950-002	Complex Litigation	-	3	

* The Law School adopted a comprehensive pass-fail policy for the **Spring 2020 semester** due to the



COVID-19 disruption. Under the policy, most courses which would have had regular letter grades but for the disruption used the following grades instead: Satisfactory-Disruption ("SD") or Unsatisfactory-Disruption ("UD"). Note: Trusts & Estates I from the Spring 2020 semester was excluded from the policy, because the course ended prior to COVID-19 disrupting campus operations.

X -- denotes no credit, re-taken

Report Generated on 06/07/2021

Official transcripts available from the University of Wisconsin Office of the Registrar.

June 14, 2021

The Honorable Elizabeth Hanes
 Spottswood W. Robinson III & Robert R. Merhige,
 Jr., U.S. Courthouse
 701 East Broad Street, 5th Floor
 Richmond, VA 23219

Dear Judge Hanes:

I am pleased to recommend Ben Alexander, a rising 3L at the University of Wisconsin Law School, for a clerkship in your chambers. I was fortunate to teach Ben twice over the past academic year, first in the Law of Democracy and then in Federal Jurisdiction. In both classes, Ben was a strong performer with a clerkship-caliber legal skill set. He communicates clearly, both orally and in writing, and he impressive digests and synthesizes complicated source material. I fully expect that he will be a highly capable law clerk.

In fall 2020, Ben took my 90-person online Law of Democracy course. It is a serious blackletter class, covering constitutional voting rights issues, the Voting Rights Act, gerrymandering, political party regulation, campaign finance, and more. Last fall was an especially challenging and fraught time to take the course given the unfolding 2020 election. Yet Ben remained focused and fair-minded throughout. In addition to having my students participate during live class sessions, I required them to make several contributions to a class discussion board. Ben's posts were exceptionally good. Although I did not ask for outside research, Ben went out of his way to find and cite sources to deepen his discussions of the Electoral College, social media's effect on campaigning, and more. In two posts, he offered several paragraphs of analysis on rulings that federal courts had just issued addressing absentee ballot rules in the run-up to the election. I think Ben managed to digest these rulings before I did, and his understanding of their procedural complexities were spot-on. Ben's final exam conveyed a similarly strong grasp of the course material. I didn't learn until the end of the semester that Ben had actually taken the class pass-fail, which makes his high level of engagement all the more impressive. He chose to go above and beyond the call of duty even when he could have coasted by with no adverse grading consequence.

In spring 2021, Ben took my 75-person Federal Jurisdiction course. This is one of the most difficult and competitive courses that the Law School offers. I teach from the classic Hart & Wechsler casebook and cover a wide range of material: justiciability doctrines, abstention doctrines, sovereign immunity, official immunity, jurisdiction stripping, habeas corpus, and much more. The class is a magnet for clerkship hopefuls, and the roster includes many of the Law School's most accomplished 2Ls and 3Ls. The average incoming GPA of the students in this spring's class was nearly a quarter point higher than the student body as a whole. Ben's performance both in the virtual classroom and on the final exam put him solidly in the top cohort of this top-cohort class—a group of highly capable students who, year after year, go on to be successful law clerks. His top 15% exam score outpaced several excellent graduating 3Ls who are about to begin clerkships. The exam was a word-limited eight-hour test with both issue spotters and an essay, and Ben produced well-crafted answers across the board. He managed to be both thorough and concise, analyzing issues carefully and offering appropriately measured conclusions.

Two other details about Ben deserve special mention: First, Ben spent several years as a teacher prior to starting law school. My sense is that this experience has given him an uncommon level of maturity. He's learned how to handle the unexpected and take challenges in stride. Second, Ben has an outstanding background in criminal law, with stints working in federal public defender offices in both Washington, D.C. and Pennsylvania. That experience should make him an especially valuable addition to chambers.

I regret that, due to the pandemic, I have not had the chance to get to know Ben better. Our interactions have been entirely virtual, but I have been impressed by what I've seen. Ben is well qualified to clerk, and I am confident that he will thrive in the role. I hope you'll give his application a close look.

Sincerely,

Robert Yablon

Associate Professor of Law

Robert Yablon - robert.yablon@wisc.edu

June 09, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am honored to write this letter of recommendation on behalf of my student, Benjamin Alexander, in support of his application for a judicial clerkship with Your Honor's chambers. Ben was a student in my Legal Research & Writing II class for first-year law students at the University of Wisconsin Law School during the spring of 2020. I interacted with Ben frequently throughout the semester, both in class and during office hours on numerous occasions. For the reasons discussed below, I highly recommend Ben as a candidate for your judicial clerkship.

When I first met Ben at the start of the spring semester, I found him to be a naturally gifted and very good legal thinker and writer. However, through hard work, determination, and careful attention to the feedback he received on his assignments, he finished the semester as one of the top performers by far in his section. Although the spring semester was interrupted and our grading system ultimately switched to "Pass-Fail" due to the Covid-19 pandemic, I still provided "advisory grades" to the students on graded assignments so that they would know where their work product ranked amongst their peers. Ben received the only "A" advisory grade in his section on the mid-semester Letter Assignment (an assignment that required students to write a letter to opposing counsel regarding a discovery dispute), and he received one of only two "A" advisory grades in the class on his Appellate Brief assignment (the final assignment for the spring semester, which would have comprised 50% of the total grade under normal grading circumstances). At the end of the year, Ben's Appellate Brief was selected as one of five semi-finalists from the entire first-year class by a panel of Wisconsin lawyers and UW Law School faculty for the Legal Research & Writing Department's annual "Best Brief" Competition. Ben deservedly now serves as the Senior Managing Editor of the Wisconsin Law Review and remains in the top 20% of his law school class.

In addition to his talents as a legal analyst and writer that I believe will make him an exceptional law clerk, Ben is a kind, patient, composed, determined, intellectually curious person with a gentle demeanor, a quick wit, and a perpetually positive attitude. I suspect these important qualities served him well and were further honed through his years of work experience as a third-grade teacher before coming to law school. I am confident that he would be an asset to Your Honor's team. I sincerely appreciate your consideration of Ben as a candidate for this clerkship, and I encourage you to contact me personally if you need additional information or have any questions. I can be reached directly at (678) 612-3442 (cell) or akfox@wisc.edu.

Respectfully submitted,

Ashby Kent Fox

Legal Research & Writing Faculty

University of Wisconsin Law School

Ashby Fox - akfox@wisc.edu - (608) 262-8557

WRITING SAMPLE

I wrote this memorandum in July 2020 as a legal intern in the office of the Federal Public Defender for the District of Columbia. The memorandum addresses whether the Supreme Court’s rule from *Brady v. Maryland* will apply at a suppression hearing where a defendant is charged with felon-in-possession of a firearm and, if so, whether there is then a viable violation of due process argument for a motion to dismiss. My supervising attorney gave me permission to use this memorandum as a writing sample and I have changed or redacted all identifying information to preserve the client’s privacy. All edits made to this sample are my own.

MEMORANDUM

TO: Jose German, Assistant Federal Public Defender

FROM: Ben Alexander, Legal Intern

DATE: July 10, 2020

RE: Mills' Motion to Suppress: Whether *Brady* Will Apply at the Suppression Hearing Stage

QUESTIONS PRESENTED

1. Whether the due process principles announced in the *Brady* line of Supreme Court cases will apply to a suppression hearing where officers used a fifteen-second segment of a live video showing an individual holding a firearm to justify a warrantless search of the individual twenty minutes later, but, for reasons unknown, the officers erased the rest of the video, thereby destroying potential impeachment evidence which could show that the search was illegal.
2. If yes, by destroying potential impeachment evidence, did the officers violate the individual's right to due process?

BRIEF ANSWERS

1. Under the facts of the individual's case, there is a strong argument for *Brady*'s application at the suppression hearing stage. Neither the United States Supreme Court nor the D.C. Circuit have ruled on whether the due process principles announced in the *Brady* line of cases apply to suppression hearings where officers used a portion of video evidence to justify a search and seizure of an individual, but destroyed the rest of the video evidence which may have impeached their justification of the warrantless search and seizure. However, the Ninth Circuit in *United States v. Barton* held that, to protect

the right of privacy, the due process principles announced in *Brady* and its progeny must apply to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant. Here, the officers justified their warrantless search and seizure of the individual with a fifteen-second segment of a live-streamed video. Because the deleted portion of the video might have contained evidence demonstrating that the officers' search and seizure of the individual lacked the requisite probable cause, there is a strong argument that the due process principles announced in the *Brady* line of cases should apply to a suppression hearing in the individual's case.

2. It will be difficult to demonstrate that the officers violated the individual's right to due process. As mentioned above, the Ninth Circuit announced in *Barton* that *Brady* and its progeny must apply to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant. The *Barton* court—using Supreme Court precedent from *Youngblood* which held that the negligent destruction of evidence does not violate due process—added that failure to preserve potentially useful evidence does not constitute a denial of due process of law unless a criminal defendant can show the officers acted in “bad faith.” Because it is not likely the individual can show the officers acted in bad faith when they deleted the rest of the video, it will be difficult to show that the deletion of the video constitutes a violation of the individual's right to due process.

STATEMENT OF FACTS

According to the Statement of Facts contained in the Criminal Complaint, members of the Metropolitan Police Department's Gun Recovery Unit (“G.R.U.”) viewed an Instagram Live video (“video”) in which two individuals took turns holding a black handgun. The G.R.U. officers allege in the Complaint that the live video took place at approximately 6:49 p.m. in the

rear parking lot of the --- block of --- Street in Northwest Washington, D.C. One officer claimed he recognized one of the individuals as Stephon Mills (“Mr. Mills”) from a previous interaction, though the report does not specify the nature of that interaction.

The G.R.U. officers allege that twenty minutes after viewing the video, they responded to the --- block of --- Street. They then allegedly observed Mr. Mills wearing the outfit that he was seen wearing in the video. Officer Kellogg approached and forcibly patted down Mr. Mills, using the video as justification for the search. Officer Kellogg found a firearm in Mr. Mills’ waistband and placed him under arrest.

The officers saved only the fifteen-second video segment, which they argue justified the forcible search of Mr. Mills, and deleted the rest of the video.

DISCUSSION

Under the facts of Mr. Mills’ case, there is a strong argument for *Brady*’s application at the suppression hearing stage for the suppression of the firearm removed from Mr. Mills’ waistband. However, because Mr. Mills likely cannot show that the officers deleted the video in bad faith, it will be difficult to show that the deletion of the potential impeachment evidence constitutes a violation of his right to due process.

I. Under the facts of Mr. Mills’ case, there is a strong argument for *Brady*’s application at the suppression hearing stage for the suppression of the firearm removed from Mr. Mills’ waistband.

In *Brady*, the United States Supreme Court held that the Due Process Clause requires a prosecutor to disclose information favorable to the accused that is material to either guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Bagley*, the Court, clarifying the scope of *Brady*, explained that impeachment evidence and exculpatory evidence fall within the *Brady* rule. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Neither the United States

Supreme Court nor the D.C. Circuit have ruled on whether the due process principles announced in the *Brady* line of cases apply at the suppression hearing stage; however, the Ninth and Fifth Circuits have held that they do under certain circumstances. *See United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993) (“To protect the right of privacy . . . the due process principles announced in *Brady* and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant.”); *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (“The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different”); *see also Smith v. Black*, 904 F.2d 950, 965–66 (5th Cir. 1990) (“[O]bjections may be made under *Brady* to the state’s failure to disclose material evidence prior to a suppression hearing,” and that “the appropriate assessment for *Brady* purposes” was whether the nondisclosure “affected the outcome of the suppression hearing”), *vacated on other grounds*, 503 U.S. 930 (1992).

Although no circuit has expressly held that *Brady* does not apply to suppression hearings, the D.C., Seventh, and Tenth Circuits have expressed skepticism on *Brady*’s application at that stage. *See United States v. Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999) (“[I]t is hardly clear that the *Brady* line of Supreme Court cases applies to suppression hearings” because “[s]uppression hearings do not determine a defendant’s guilt or punishment, yet *Brady* rests on the idea that due process is violated when the withheld evidence is ‘material either to guilt or to punishment’”); *United States v. Stott*, 245 F.3d 890, 902 (7th Cir. 2001) (“we cannot say that the law is clear on the question of whether *Brady* should apply to suppression hearings”); *United States v. Harmon*, 871 F. Supp. 2d 1125, 1151 (D.N.M. 2012) (“[I]t is not likely that a prosecutor must disclose

impeachment evidence before a suppression hearing in light of the Supreme Court’s conclusion in *United States v. Ruiz* that a prosecutor does not have to disclose impeachment evidence before the entry of a guilty plea”), *aff’d*, 742 F.3d 451 (10th Cir. 2014). These cases, however, are distinguishable from the instant case, which is more analogous to *United States v. Barton*.

The section below will outline the argument for why the *Brady* rule should apply at the suppression hearing stage under the circumstances of Mr. Mills’ case. Part A will distinguish Mr. Mills’ case from the D.C. Circuit’s decision in *United States v. Bowie* and from other decisions where circuit courts either expressed doubt about whether *Brady* applies at suppression hearings or declined to apply *Brady* at suppression hearings. Part B will show how Mr. Mills’ case closely resembles the Ninth Circuit case of *Barton* and, thus, why the court here should follow its rule.

A. Mr. Mills’ case is distinguishable from the cases where circuit courts avoided deciding whether *Brady* applies at suppression hearings and where circuit courts declined to apply *Brady* at suppression hearings.

Although there is no on-point precedent from the D.C. Circuit, the court has expressed skepticism on whether *Brady* applies at suppression hearings. *See United States v. Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999). In *Bowie*, the appellant, Bowie, argued that the government’s failure to disclose an ongoing investigation into his arresting officer prior to his trial’s conclusion violated his due process rights under *Brady*. *See id.* at 907. Bowie argued that the investigation of the officer constituted valuable impeachment evidence against the arresting officer, who also testified at Bowie’s trial. *See id.* Because of the delayed disclosure, Bowie argued under *Brady* he must be granted a new trial. *Id.* The court disagreed, explaining that Bowie failed to show that there was a reasonable probability that the jury would have acquitted him had the wrongfully withheld investigation been disclosed before the end of his trial. *See id.* at 912. The court also dismissed Bowie’s “faint[.]” suggestion that it should consider whether Bowie’s suppression

hearing would have come out differently had the investigation into the officer been disclosed beforehand. *Id.* In casting aside Bowie’s suggestion, the court explained that “it is hardly clear that the *Brady* line of Supreme Court cases applies to suppression hearings,” because “[s]uppression hearings do not determine a defendant’s guilt or punishment, yet *Brady* rests on the idea that due process is violated when the withheld evidence is ‘material either to guilt or to punishment.’” *Id.* (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The court further explained that Bowie raised the issue for the “first time in his reply brief and then only obliquely.” *Id.* Thus, the court declined to decide whether the failure to disclose the impeachment evidence prior to the suppression hearing violated Bowie’s due process rights. *Id.*

Because the circumstances surrounding the D.C. Circuit’s decision in *Bowie* are distinguishable from the circumstances of Mr. Mills’ case, *Bowie* does not resolve whether the *Brady* rule ought to apply to a suppression hearing here. In *Bowie*, the defendant raised the issue “in a caption in his reply brief but not in the body,” which the court determined to be raising the issue “[t]oo late” because they had not been adequately briefed on it. *See id.* at 912. Thus, the D.C. Circuit, rather than determining *Brady* did not apply to suppression hearings, noted in dicta that the application was “hardly clear” when “obliquely” raised. *See id.* Furthermore, *Bowie* involved the delayed disclosure of impeachment evidence, not the destruction of evidence crucial to determining whether a search and seizure violated the defendant’s Fourth Amendment rights. In *Bowie*, the withheld impeachment evidence concerned a testifying officer’s presence on a list of officers under investigation. *See id.* at 908. The testifying officer’s presence on the “Lewis” list stemmed from his behavior as a witness in an unrelated case which led the judge to doubt his credibility. *See id.* at 910. Though the evidence was provided after trial, its probative value to the outcome of the suppression hearing was arguable at best. Thus, the D.C. Circuit chose not to

weigh whether the withheld evidence would have affected the suppression hearing's outcome.

See id. at 912.

In Mr. Mills' case, however, the probative value of the deleted video is indeterminable because it no longer exists. But consider the following hypothetical. In the Instagram Live video, after the selectively saved fifteen-second segment ends, the other individual in the video takes the handgun from Mr. Mills and places it in his own waistband. Would the officers, having viewed the individual take and store the gun on his body, have probable cause to search Mr. Mills? Probably not. Thus, the destruction of potential impeachment evidence in Mr. Mills' case raises an issue starkly different from the delayed disclosure of potential impeachment evidence in *Bowie*. Because of these differences, *Bowie* provides only weak support, at best, for why *Brady* should not apply at a suppression hearing here.

The Seventh Circuit, like the D.C. Circuit, ducked the opportunity to resolve this issue when addressing it under a deferential plain error standard of review. *See United States v. Stott*, 245 F.3d 890, 901 (7th Cir. 2001). In *Stott*, the defendant, who had been convicted of conspiracy to distribute cocaine, argued that his due process rights were violated when the government failed to disclose an FBI agent's grand jury testimony prior to a suppression hearing that concerned his in-custody statements. *See id.* at 900. The court dismissed Stott's argument, explaining that, "[b]ecause the law concerning *Brady's* application to suppression hearings is not clear or obvious we cannot find plain error." *Id.* at 902 (internal quotations omitted).

Stott, like *Bowie*, is distinguishable from Mr. Mills' case. First, in *Stott*, the Seventh Circuit examined the issue through a deferential plain error standard of review because the appellant failed to present the argument in district court. *See id.* at 900. Also, in *Stott*, the Seventh Circuit determined that the delayed disclosure of impeachment evidence did not

“seriously affect[] the fairness, integrity or public reputation of [the] judicial proceedings,” because the evidence was disclosed in time for the defendant to ask the court for reconsideration on his motion to suppress. *See id.* at 903. Here, the potential impeachment evidence at issue—the deleted video that allegedly justified a search of Mr. Mills—could not be merely dilatory because it was destroyed. Thus, whether the officer’s search and seizure of Mr. Mills constituted a Fourth Amendment violation is indeterminable. Because of these key differences, the Seventh Circuit’s reluctance to apply *Brady* at the suppression hearing stage in *Stott* does not resolve whether *Brady* ought to apply at a suppression hearing in Mr. Mills’ case.

More recently, the Tenth Circuit, although not addressing the issue directly, affirmed a district court opinion which provided that, *inter alia* (the opinion is nearly fifty-pages long), it is “unlikely” that *Brady* applies to suppression hearings. *See United States v. Harmon*, 871 F. Supp. 2d 1125, 1151 (D.N.M. 2012), *aff’d*, 742 F.3d 451 (10th Cir. 2014). The *Harmon* court arrived at this conclusion based on its reading of *United States v. Ruiz* where the Supreme Court held that the restrictions from *Brady* do not require “preguilty plea disclosure of impeachment information.” *Id.* at 1150 (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002)). In arriving at its holding, the *Ruiz* Court reasoned that “[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant.” *Ruiz*, 536 U.S. at 630. From *Ruiz*’s rule, the *Harmon* court determined that “it is not likely that a prosecutor must disclose impeachment evidence before a suppression hearing in light of the Supreme Court’s conclusion . . . that a prosecutor does not have to disclose evidence before the entry of a guilty plea.” *See Harmon*, 871 F. Supp. 2d at 1151.

Harmon, like *Bowie* and *Stott*, concerned whether *Brady* applied to the delayed disclosure of impeachment evidence at a suppression hearing (*Ruiz* concerned a delayed disclosure prior to a plea deal)—not whether *Brady* applied to the destruction of impeachment evidence at a suppression hearing. This distinction is crucial, especially where, as here, the destroyed impeachment evidence could potentially show that the search and seizure of the defendant violated the Fourth Amendment; in which case, a motion to suppress would almost certainly succeed had the impeachment evidence survived. Also, while in some cases impeachment evidence may be fairly characterized as “not critical” to the trial’s outcome, when the impeachment evidence at issue has been destroyed, its value is indeterminable. *See Ruiz*, 536 U.S. at 630. Furthermore, when potential impeachment evidence could show that a search and seizure was illegal, it is clearly critical. Thus, because the difference between the delayed disclosure and destruction of impeachment evidence is crucial when analyzing the due process implications, *Harmon* and *Ruiz* offer little to resolve whether *Brady* applies to a suppression hearing in Mr. Mills’ case.

In sum, because there are clear and significant distinctions between the cases discussed above and Mr. Mills’ case, those cases provide only weak arguments for why *Brady* should not apply to a suppression hearing here.

B. The instant case closely resembles *Barton* and, therefore, there is a strong argument that the court here should follow its rule.

Barton—unlike the abovementioned cases which concerned the delayed disclosure of impeachment evidence—addressed whether the negligent *destruction* of evidence tending to impeach allegations demonstrating probable cause in an affidavit for a search warrant violated the *Brady* rule at the suppression hearing stage. *United States v. Barton*, 995 F.2d 931, 934 (9th Cir. 1993). Although, the *Barton* court held that *Brady* must apply to suppression hearings under

those circumstances, it ultimately did not find a due process violation because the defendant could not prove the officers destroyed the potential impeachment evidence in bad faith. The bad faith requirement's application to Mr. Mill's case will be discussed in this memorandum's final section.

In *Barton*, two detectives received a tip that the appellant, Barton, had ordered marijuana seeds. *Id.* at 932. The detectives claimed they smelled marijuana when they approached Barton's front door. *Id.* Upon being let inside by Barton, the detectives claimed the marijuana odor got stronger. *Id.* at 933. Barton, however, did not consent to a search of his residence. *Id.* Soon after, the officers obtained a search warrant, issued based on statements made in the affidavit that the detectives "smelled marijuana when Barton opened the door, and that the odor of marijuana became stronger once he stepped inside Barton's residence." *Id.* The search of Barton's residence yielded approximately 105 marijuana plants. *Id.* According to protocol, the officers cut the marijuana plants, placed them in unventilated bags, and stored them in the Drug Task Force's evidence vault. *Id.*

Barton subsequently filed a motion to suppress the marijuana plants recovered during the execution of the search warrant. *Id.* At the hearing, Barton argued that the officers did not have probable cause to search his home. *Id.* Barton premised his argument on his claim that the plants seized were of a type that do not emit odor, but because the officers placed the plants in unventilated bags, they were destroyed and so too was their capacity for impeaching the officers' affidavit statements. *Id.* In other words, "Barton argued that the officers' failure to preserve the marijuana denied him access to [impeachment] evidence that would have supported his contention that the plants did not emit an odor, and demonstrated that the allegations in the affidavit were false." *Id.*

The Ninth Circuit, noting that the Supreme Court had yet to address the issue, acknowledged that the Court has recognized a defendant's Fourth Amendment right to challenge the truthfulness of statements made in an affidavit supporting a search warrant. *See id.* at 934 (citing *Franks v. Delaware*, 438 U.S. 154, 156 (1978)). The *Franks* Court reasoned "that the Fourth Amendment's requirement of probable cause 'would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile.'" *Id.* (quoting *Franks*, 438 U.S. at 168). Drawing on this rationale, the Ninth Circuit concluded, "[t]o protect the right of privacy, we hold that the due process principles announced in *Brady* and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant." *Id.* at 935.

The Ninth Circuit's line of reasoning is even stronger where, as here, the constitutionality determination was not approved by a neutral magistrate but made on the spot by the arresting officer. *Cf. United States v. Leon*, 468 U.S. 897, 913–14 (1984) ("a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the competitive enterprise of ferreting out crime"). Like in *Barton*, the officers here destroyed part of the evidence used to support their justification for a search and seizure. Also, like in *Barton*, the destruction of this evidence, allegedly justifying their search, also potentially eliminated valuable evidence which could have been used to impeach the officers' probable cause claim. However, in *Barton*, the officers obtained a search warrant issued by a neutral magistrate, albeit premised on evidence that they ultimately destroyed. Here, the officers instead opted to use a fifteen-second video segment to justify a warrantless search of Mr. Mills and deleted the rest of the video. As

explained in *Barton*, “[b]y deliberately destroying impeaching evidence, an officer could feel secure that false allegations in her affidavit for a search warrant could not be challenged.” *Id.* Similarly, an officer could strategically extract fifteen-seconds of footage from an Instagram Live video to argue his search of an individual was legal, but delete the remaining footage that shows the search, in fact, lacks probable cause.

In sum, because the Ninth Circuit’s holding employed a line of reasoning that is equally, if not more, applicable to circumstances where there is no search warrant, Mr. Mills’ has a strong argument that *Brady*’s due process principles should apply to a suppression hearing here.

II. Because Mr. Mills likely cannot show that the officers deleted the video in bad faith, it will be difficult to show that the deletion of the potential impeachment evidence constitutes a violation of his right to due process.

In *Youngblood*, the Supreme Court held that the government’s failure to preserve potentially exculpatory evidence does not automatically violate due process; but, rather, to establish a due process violation, a defendant must show that the evidence was destroyed in “bad faith.” *See United States v. Barton*, 995 F.2d 931, 934 (9th Cir. 1993) (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)). In *Barton*, after determining that “*Brady* and its progeny must apply to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit search warrant,” the Ninth Circuit decided that there was “no principled reason why [*Youngblood*’s] bad faith requirement should not [apply] to a suppression hearing.” *Id.* at 935.

In *Youngblood*, Arizona police failed to preserve semen samples from the body and clothing of a sexual assault victim. The defendant argued the failure to preserve the evidence deprived him of due process. The Supreme Court disagreed and concluded that, although *Brady*

makes the good or bad faith of the State irrelevant when [it] fails to disclose to the defendant material exculpatory evidence, the due process clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no

more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.

See Youngblood, 488 U.S. at 57 (quoting *United States v. Ramos*, 27 F.3d 65, 69 (3d Cir. 1994)).

Thus, unless the defendant can show bad faith, destruction of evidence with potential impeachment value likely does not constitute a violation of the defendant's due process rights. *See id.* at 58; *see also California v. Trombetta*, 467 U.S. 479 (1984) (police officers' failure to preserve breath samples did not violate the due process clause when the officers were acting in good faith and in accordance with their normal practice); *Barton*, 995 F.2d at 935 (government's negligent destruction of marijuana plants which could have impeached agents' statement in an affidavit for probable cause was held not violative of due process absent a showing of bad faith).

The government has a strong argument that Mr. Mills must demonstrate that the officers destroyed the rest of the video in bad faith to establish a violation of his due process rights. The government will likely argue that the officers, upon seeing Mr. Mills in the video with a firearm, acted quickly to apprehend him; and because they had to move quickly to retrieve the firearm, the officers hastily extracted the fifteen-second segment, and accidentally (or negligently) deleted the rest. Twenty minutes later, upon seeing Mr. Mills wearing the same outfit that he wore in the video, Officer Kellogg reasonably believed that Mr. Mills was armed, and, thus, possessed probable cause to forcibly search Mr. Mills. Although deleting the rest of the video was arguably negligent (but perhaps common practice), proving that it was done in bad faith will be difficult. Furthermore, Officer Kellogg recovered a firearm—which they will try to prove was the firearm seen in the video—during his search of Mr. Mills. This fact will likely make any argument that the officers acted in bad faith less persuasive.

In sum, because Mr. Mills likely cannot show that the officers deleted the video in bad faith—something he will likely have to show to establish a due process violation—it will be difficult to show that the deletion of the video constitutes a violation of his right to due process.

CONCLUSION

In sum, though there is a strong argument that the due process principles announced in the *Brady* line of cases should apply at the suppression hearing stage in Mr. Mills' case, the government has an equally strong argument that Mr. Mills must show that the officers destroyed the potential impeachment evidence in bad faith to establish a due process violation. Because Mr. Mills likely will not be able to show the officers acted in bad faith, it will be difficult to argue successfully that the officers violated his right to due process.

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 26, 2021

The Honorable Elizabeth Hanes
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701 East Broad Street, 5th Floor
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Dear Judge Hanes:

I am a 2020 cum laude graduate of the University of California, Irvine ("UCI") School of Law. I write to apply for a two-year judicial clerkship beginning in 2022, after I have completed my two-year clerkship with the Honorable Jeannette H. Castagnetti.

I believe that my breadth of life experiences and skills in creating clear, concise, and accurate work will be an asset to your chambers. Specifically, as a judicial law clerk, I have briefed over ninety motions for summary judgment, processed hundreds of ex parte motions, and drafted multiple minute orders ruling on non-hearing motions. Also, I participated in several of UCI School of Law's legal clinics, including the Reproductive Justice Law Clinic (Spring 2016 and Fall 2016 as a Ph.D. student), the International Human Rights Clinic (Summer 2018), and the Intellectual Property, Arts, and Technology Clinic (Spring 2019 and Summer 2019). Additionally, I completed a judicial externship with the U.S. District Court for the Central District of California's Patent Pilot Program, drafting opinions and memoranda for the Program's seven judges. Further, I completed a Ph.D. in Public Health in June of 2020 (at UCI), authoring two journal articles and teaching courses in public health and epidemiology. Finally, I was an over-the-road truck driver prior to law school, hauling expedited freight as part of a driving team.

Enclosed, please find my resume, transcripts, recommendations, and writing sample. My writing sample is a draft of an opinion that I wrote for Judge Andre Birotte, included with his permission. Additionally, I have included three references below. Thank you for your consideration.

Sincerely,

Jaime Allgood

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U.S. District Court for the Central District of California

Full-time Judicial Extern for the Patent Pilot Program

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Researched substantive and procedural issues involving patent law for the Patent Pilot Program's judges.

Drafted memoranda, decisions, and orders on motions. Observed trials.

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Research Assistant for Professor Christopher Whytock

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International Human Rights Clinic with Professor Paul Hoffman

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Participated in the Reproductive Justice Law Clinic during Spring 2016 and Fall 2016. Drafted research memoranda analyzing reproductive justice legal issues.

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INTERESTS

Interests include goat farms, coffee, and maintaining my sense of personal integrity.

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CRIMINAL PROCEDURE LAW 513 4.0 S
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LAWYERING SKLS II OF LAW 506B 3.0 A 12.0
LEG RESEARCH PRACTI LAW 508B 0.5 S SU
LEGAL PROFESSION II LAW 507B 2.0 B+ 6.6
TERM TOTALS: 3.431 GPA 16.0 54.9

UCI PHD PUBLIC HEALTH

TOTAL 10.0*

FALL SEMESTER 2018

CORPORATE GOVERNANCE LAW 5958 1.0 S SU
LEG & CONGR PROCESS LAW 5840 2.0 S SU
PART-TIME EXT SUM OR LAW 597X 4.0 S SU
RESEARCH FELLOW LAW 298T 2.0 S SU
ANTITRUST LAW 521N 3.0 A- 11.1
TERM TOTALS: 3.700 GPA 3.0 11.1

SPRING SEMESTER 2019

EVIDENCE LAW 514 4.0 A 16.0
INTELL PROP CLINIC LAW 597P 6.0 A 24.0
RESEARCH FELLOW LAW 298T 2.0 S SU
TERM TOTALS: 4.000 GPA 10.0 40.0

FALL QUARTER 2019

INT PRSPCTIV ON LAW CRM/LAW 275 2.6 A 10.4
TERM TOTALS: 4.000 GPA 2.6 10.4

FALL SEMESTER 2019

FULL-TIME EXTRNSHIP LAW 597FT 10.0 S SU
DIRECTED RESEARCH LAW 299 3.0 A 12.0

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Elizabeth Bennett, University Registrar

AUTHENTICITY SECURITY INFORMATION ON REVERSE

School of Law Registrar's Office
401 E. Peltason Dr., Suite 1000
Irvine, CA 92697-8000

University of California, Irvine
Irvine, California 92697

UC Irvine School of Law

949.824.0066 — registrar@law.uci.edu

www.law.uci.edu

The University of California, Irvine School of Law opened in August 2009 on the semester system. Minimum full-time enrollment is 12 units. The following information is offered to assist in the evaluation of this student's academic record.

GRADING

Letter Grade:		Grade Points: (per unit)		
A +, A, A-		4.3,	4.0,	3.7
B +, B, B-		3.3,	3.0,	2.7
C +, C, C-		2.3,	2.0,	1.7
D				1.0
F			0.0	No unit credit awarded.
S	...Satisfactory		0.0	Equivalent to a grade C- or better. Not calculated in the GPA.
U	...Unsatisfactory		0.0	Equivalent to a grade D or lower. Not calculated in the GPA.
I	...Incomplete		0.0	Coursework still in progress.
IP	...In Progress		0.0	Multiple term course, graded upon completion.
NR	...No Report		0.0	No grade submitted by instructor or an unresolved discrepancy in course enrollment.

EXPLANATION OF CODES

SU	...Satisfactory/Unsatisfactory	Course taken for credit only.
U1	...Graduate Coursework	Does not apply toward law degree GPA.
WC	...Workload Credit Only	Does not apply toward graduation.

SCHOLASTIC NOTATIONS

Additional information on law school awards can be found at the law school website:

<http://law.uci.edu/academics/registrar/transcripts.html>

PROBATION

Law students are normally subject to academic probation if at the end of the first year or any subsequent semester their cumulative grade point average (GPA) is less than 2.5 beginning with students who matriculated in or after August 2015, or 2.0 for students who matriculated before August 2015.

RANK

The School of Law does not rank its student body.

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UNIVERSITY REGISTRAR

UNIVERSITY OF CALIFORNIA, IRVINE

XXX-XX-7432

50046-920

ALLGOOD, JAIME MARGARET

SOCIAL SECURITY NO.

STUDENT NO.

NAME OF STUDENT

MAR 2014

04/23/XX

GRADUATE

PUBLIC HEALTH

DATE ADMITTED

DATE OF BIRTH

ACADEMIC CAREER 06/30/20

MAJOR PROGRAM

06/06/21

DOCTORS DEGREES

ADVANCED TO CANDIDACY 05/29/15

DISSERTATION FILED 04/07/20

POTENTIAL EXPOSURE TO HALOGENATED

FLAME-RETARDANT CHEMICALS FROM ELECTRONICS

IN ACADEMIC ENVIRONMENTS

DEGREE CONFERRED - JUNE 12, 2020

PHD PUBLIC HEALTH

MEMORANDA

03/26/14 PROGRAM CHANGED FROM SOCIAL ECOLOGY

PRO-BONO ACHIEVEMENT (50+ HRS) 2018-19

DUE TO COVID-19 SPR 2020 LAW GRADES REQD S/U

EXCEPTION: SHORT SESSN & WTR QTR GRADES POST

FALL QUARTER 2012

SEM IN SOC ECOLOGY SOCECOL 200 4.0 A+ 16.0

DEMOGRAPHIC ANALYSIS PUBHLTH 209 4.0 A+ 16.0

DIRECTED STUDIES PUBHLTH 298 4.0 A+ 16.0

WINTER QUARTER 2013

HLTH STATUS & CARE PUBHLTH 250 4.0 A+ 16.0

DIRECTED STUDIES PUBHLTH 298 4.0 A+ 16.0

UNIVERSITY TEACHING PUBHLTH 399 4.0 S

SPRING QUARTER 2013

INDUSTRIAL TOXICOL PUBHLTH 278 4.0 A+ 16.0

RESEARCH DESIGN PUBHLTH 297 4.0 A+ 16.0

DIRECTED STUDIES PUBHLTH 298 4.0 A+ 16.0

FALL QUARTER 2013

DATA ANALYSIS SOCECOL 264A 4.0 A+ 16.0

CLNCL TRNSLATNL SCI PUBHLTH 293 4.0 A+ 14.8

DIRECTED STUDIES PUBHLTH 298 4.0 A+ 16.0

INTRO TO MED STATS BATS 209A 4.0 A+ 16.0

WINTER QUARTER 2014

DATA ANALYSIS SOCECOL 264B 4.0 A+ 16.0

INDEPENDENT STUDY PUBHLTH 299 4.0 A+ 16.0

INTRO MED STATS II BATS 209B 4.0 A+ 14.8

INTRO CLINICAL EPI BATS 210A 4.0 A+ 16.0

SPRING QUARTER 2014

ADV EPIDEM METHODS PUBHLTH 205 4.0 A+ 16.0

DIRECTED STUDIES PUBHLTH 298 4.0 S

INDEPENDENT STUDY PUBHLTH 299 4.0 A+ 16.0

FALL QUARTER 2014

QUAL RES INURS SCI UN NUR SCI 246 4.0 A+ 16.0

HLTH BEHAVIOR THRY PUBHLTH 244 4.0 A+ 16.0

GRAD HUM EXP MODING PUBHLTH 279 4.0 A+ 16.0

DIRECTED STUDIES PUBHLTH 298 4.0 S

WINTER QUARTER 2015

ADV IN SOCIAL EPI PUBHLTH 208 4.0 A+ 16.0

HLTH PROMO PLANNING PUBHLTH 245 4.0 A+ 16.0

DIRECTED STUDIES PUBHLTH 298 4.0 S

SPRING QUARTER 2015

RSCH COMMUNICATION PUBHLTH 294 4.0 A+ 16.0

INDEPENDENT STUDY PUBHLTH 299 8.0 A+ 32.0

FALL QUARTER 2015

DOCTORAL DISSERTATN PUBHLTH 296 12.0 S

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Elizabeth Bennett, University Registrar

AUTHENTICITY SECURITY INFORMATION ON REVERSE

University Registrar
215 Aldrich Hall

www.reg.uci.edu
(949) 824-6124

University of California
Irvine, California
92697-4975

The University of California, Irvine, opened in September 1965 operating on the quarter system. Each quarter has ten weeks of instruction. The average student course enrollment is four courses (16 units). Minimum full-time enrollment is 12 units. The A+ grade was introduced fall quarter 1989; all other plus and minus grades were introduced fall quarter 1973.

GRADING

Letter Grade:		Grade points: (per unit)	Credit allowed:		Grade points	
			Attempted	Passed		
A+, A, A-	...excellent	4.0, 4.0, 3.7	Yes	Yes	Yes	
B +, B, B-	...good	3.3, 3.0, 2.7	Yes	Yes	Yes	
C+, C, C-	...fair	2.3, 2.0, 1.7	Yes	Yes	Yes	
D +, D, D-	...barely passing	1.3, 1.0, 0.7	Yes	Yes	Yes	
F	...failure	0	Yes	No	No	
I	...incomplete	0	Yes	No	Yes	Prior to fall 1968
		0	No	No	No	Beginning fall 1968
IP	...in progress	0	No	No	No	Certain sequential courses for which the final grade is assigned to previous quarter(s) of the sequence.
NP	...not pass	0	No	No	No	Equal to grade C- or below. (Undergraduates)
NR	...no report	0	No	No	No	No grade submitted by instructor or an unresolved discrepancy in course enrollment.
P	...pass	0	No	Yes	No	Equal to grade C or better. (Undergraduates)
S	...satisfactory	0	No	Yes	No	Equal to grade B or better. (Graduates)
U	...unsatisfactory	0	No	No	No	Equal to 8- or below. (Graduates)
UR	...unauthorized repeat	0	No	No	No	No credit.
W	... withdrew	0	No	No	No	Course dropped after sixth week of instruction.
Course Credit Codes:						
G0	*	Yes	Yes	Yes	Repeat of F or NP for letter grade.	
G1	*	Yes	No	Yes	Repeat of C-, D+, D, or D-; units taken from original enrollment.	
G2	*	Yes	Yes	Yes	Satisfaction of incomplete grade.	
G5	0	No	No	No	Effective fall of 1984, repeat of C or better; prior to fall of 1984, repeat of C- or better; no credit.	
GP	0	No	No	No	Repeat of course taken pass/not pass or satisfactory/unsatisfactory; no credit.	
GW	0	No	No	No	Repeat of a workload credit only course.	
I	0	Yes	No	Yes	Original grade was I which converted to F, NP or U after deadline to rectify passed.	
IP	D	Yes	No	Yes	Original grade was IP which converted to an I after deadline to rectify passed.	
K1	*	Yes	Yes	Yes	Credit by exam.	
L6	0	No	No	No	Repeat of advanced standing or high school course; no credit	
M1	0	No	No	No	No credit for work while under dismissal.	
M2	*	Yes	Yes	Yes	Credit for work while under dismissal.	
M4	0	No	No	No	No credit for work after graduation.	
NR	0	Yes	No	Yes	Original grade was NR which converted to F, NP or U after deadline to rectify passed.	
PG	0	No	Yes	No	Repeat of NP or U.	
PN	0	No	Yes	No	Course taken pass/not pass.	
RC	0	No	Yes	No	Course has been repeated; original grade B-, C+, C or C-; graduate student only.	
RD	0	No	Yes	No	Course has been repeated; effective fall 1984, original grade C-, D+, D or D-; prior to fall 1984, original grade D+, D or D-.	
RF	0	No	No	No	Course has been repeated; original grade F.	
RR	0	No	No	No	Course repeated more than once.	
RW	0	No	No	No	Workload credit only course has been repeated.	
SU	0	No	Yes	No	Course taken satisfactory/unsatisfactory.	
WC	0	No	No	No	Workload credit only; does not apply toward graduation.	
##					See memoranda section of transcript.	

* Grade points reflect grade received.

COURSE NUMBERING

1 - 99	Lower division courses	300 - 399	Professional courses for teachers
100 -199	Upper division courses	400 & above	Other professional and graduate courses
200 - 299	Graduate courses		

SCHOLASTIC NOTATIONS

Effective spring quarter 1969, the Irvine campus deleted all scholastic notations from students' official records. Beginning fall quarter 1979 "Academic Disqualification" or "Dismissed" has been noted on appropriate student records.

The notation "Deans Honor List" was introduced spring quarter 1972 for undergraduate students who complete 12 or more graded units in a quarter with a GPA of 3.500 or better.

Beginning winter quarter 1970, courses completed by "Limited" status students were at the post baccalaureate level.

An I grade (Incomplete) assigned fall 2010 and after will convert to an F, NP, U, as appropriate, when coursework is not satisfactorily made up by the student.

PROBATION

Undergraduate students are normally subject to academic probation if at the end of any quarter their grade point average for that quarter, or their cumulative University of California grade point average, is less than 2.0.

ACCREDITATION

Western Association of Schools and Colleges.

June 26, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to very strongly and enthusiastically recommend Jaime Allgood for a clerkship in your chambers. I met Ms. Allgood in fall 2017, when she was a student in my section of Procedural Analysis, which is the UC Irvine School of Law's required first-year course on federal civil procedure. Beginning February 2018, I worked closely with her as a research assistant. I also supervised a pro bono project undertaken by a team that included Ms. Allgood. For these reasons, I know Ms. Allgood and her work well, and make this recommendation with a very high degree of confidence.

Ms. Allgood had the fifth highest overall course score out of 53 students in my section of Procedural Analysis, earning an "A." Throughout the semester, she was consistently among the very top performers on quizzes, assignments and class participation, and she wrote an excellent final exam. She was also one of my favorite students—engaged, inquisitive, focused, and willing to express, defend, and reconsider her opinions. Her performance in my class is consistent with her overall outstanding academic record. In addition to an undergraduate GPA of 3.82 at UCLA, she graduated from UCI Law with a 3.74 GPA and from UCI's Ph.D. in Public Health program with a 3.97 GPA.

Ms. Allgood is one of the best 3 or 4 research assistants out of the dozens I have worked with in my more than 10 years of law teaching. Her work is meticulous, on point, and on time. For example, she did excellent research to support a book chapter I wrote on access to justice. The research was thorough, she stayed focused on the questions I gave her, and she presented her results in a pair of clearly written memoranda. I relied on that work product with confidence, feeling comfortable pasting significant portions of it into my manuscript.

She also has done extensive work for me on two projects involving empirical analysis of litigation trends. While this type of empirical work is not the type of work ordinarily expected of a judicial clerk, it does require considerable patience, an extraordinary level of attention to detail, and strong analytical instincts and abilities—all of which are traits that I believe will make her especially valuable as a judicial clerk. For one project, she helped me create an original dataset by extracting detailed information from hundreds of state and federal court opinions and entering it into a data management system. For the other project, she took the lead on the preliminary statistical analysis of data to test a number of hypotheses I had developed about transnational litigation trends in U.S. courts.

But what makes Ms. Allgood truly stand out to me among research assistants is her willingness to provide constructive criticism about my ideas and my writing in ways that have significantly improved my work. After completing a draft of the book chapter on access to justice, I asked her to review and edit it. She not only reliably formatted the citations and caught a number of typographical errors that escaped spell-check. She also spotted various ways for me to improve the structure and clarity of the chapter, and she helped me fine-tune portions of my argument. The chapter is better because of that.

Ms. Allgood wants to get things done. That is apparent in her diligent and timely completion of the research tasks I have assigned to her. It also was apparent to me when I supervised the work of a group of students—including Ms. Allgood—on a pro bono project. All of the students were still in their first year of law school, except for Ms. Allgood. Apparently sensing that the first-year students were not sure how and where to start, Ms. Allgood promptly stepped up as the leader of the group and worked patiently with the other students to allocate responsibilities and get the project moving forward.

On top of all of this, in August 2020, Ms. Allgood began a two-year clerkship in the Circuit Court of the First Circuit, State of Hawaii, which will give her substantial experience with the judicial process and help her contribute effectively to your work from the first day of a clerkship in your chambers.

At a personal level, Ms. Allgood is professional, mature and hardworking, and she strikes me as genuinely enjoying her work. She has curiosity, good judgment, and good sense of humor, all of which make her a pleasure to work with. I am very confident that you will find her to be an outstanding clerk and a congenial colleague. I very strongly recommend her.

Sincerely,
Christopher A. Whytock
Professor of Law and Vice Dean

Chris Whytock - cwhytock@law.uci.edu - 949-824-0496

Chris Whytock - cwhytock@law.uci.edu - 949-824-0496

June 26, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

First, I want to wish you the best of health and continued safety during the pandemic, which may go on for many months. Next, I want to thank you for your service to our country as a member of the world's most independent judiciary.

I write today to strongly recommend that you award one of your 2022-23 judicial clerkships to Jaime Allgood, a recent graduate of the University of California, Irvine School of Law, who is now in the first year of a two-year clerkship with Judge Jeannette Castagnetti, of the O'ahu First Circuit of the State of Hawaii.

Jaime is keenly intelligent, energetic, conscientious and a self-starter. She has intellectual breadth, illustrated by the stellar work she did obtaining a Ph.D. in public health, while earning her J.D. cum laude from UCI. Jaime also is more mature and has a broader range of life experiences than most graduating law students, stemming in part from the time she spent as an over-the-road truck driver.

Jaime was one of the top students in my Lawyering Skills class during the spring semester, 2018. She did a first rate job on all assignments, including the preparation of a summary judgment motion on behalf of a university that was a defendant in a hypothetical Title IX sexual harassment case. Jaime also made valuable contributions to class discussions on a bevy of issues.

I was on sabbatical during the 2017 fall semester, so I had Jaime as a student solely for the second half of Lawyering Skills, the only core course at our law school that is worth three units each semester. Even though Jaime was my student for one semester, she was one of the students I chose to be one of my Research Fellows (teaching assistant) for the entire Lawyering Skills class for the 2018-2019 academic year.

I give considerable thought to my choice of Research Fellows. The student has to have done very well in the class, which includes short and long memos, quick research turnarounds, an introduction to negotiation and the drafting of a litigation settlement document, in addition to drafting the aforementioned summary judgment motion. The Research Fellow also has to have excellent people skills because she will be working with first year students of varying levels. Jaime was an easy choice because she responded well to suggestions on how to improve her work, relates easily to a wide variety of people and has a good sense of humor. She did an excellent job in the position, helping elevate the work of all five students who were in her group, including one who got the highest grade in the class.

I also had Jaime as a student in her final semester of law school in a class I co-teach on Law and Popular Culture. The students view and write about a wide range of media presenting legal subjects ranging from a documentary about The Central Park Five to the adaptation of "A Civil Action" and episodes of "The Good Wife." The students have to engage a number of sensitive subjects, including racism, sexism and a host of legal ethics questions. Jaime made invaluable contributions to the class and was not afraid to firmly, but politely, take issue with her fellow students.

Although her overall academic record at the law school was strong, I want to emphasize that Jaime excelled in subjects that seem particularly important for a law clerk—Writing, Research, Civil Procedure, Constitutional Law and Evidence. Additionally, she also did considerable research for three of my colleagues, Professors Michele Goodwin, Christopher Whytock and Paul Hoffman.

Jaime's analytical and writing skills were enhanced during the past year when she participated in a special program working with some of the judges at the U.S. District Court in Santa Ana, Ca. in a new program dealing with patent cases. And I have no doubt that those skills are being even further enhanced during her clerkship with Judge Castagnetti

Judge, I realize that you receive applications from highly qualified students from law schools around the country and that U.C. Irvine School of Law is still a relatively new school, having enrolled its first group of students barely a decade ago. Nonetheless, we feel that our students already have established a strong record of both garnering and performing well in clerkships at federal courts around the country, including the 3rd, 4th, 5th, 6th, 9th, 10th, 11th and D.C. Circuits, as well as numerous federal district courts.

Henry Weinstein - hweinstein@law.uci.edu - (949) 824-3642

I recommend Jaime without reservation. She will bring to your chambers strong writing and research skills, as well as the ability to work well as part of a team. If I can provide any additional information, please do not hesitate to contact me, either by email (hweinstein@law.uci.edu) or phone (office—949-824-3642, cell—323-445-7006).

Sincerely,

Henry Weinstein
Professor of the Practice of Law

Henry Weinstein - hweinstein@law.uci.edu - (949) 824-3642

JAIME ALLGOOD

502 Keawe Street #614, Honolulu, HI 96813 • (949) 316-9928 • jallgood@lawnet.uci.edu

WRITING SAMPLE #1

As a full-time judicial extern with the U.S. District Court for the Central District of California's Patent Pilot Program, I prepared the attached draft opinion for Judge Andre Birotte. The draft opinion addressed the Defendants' Motion to Set Aside Entry of Default. To preserve confidentiality, all party names have been blacked out. I have received permission from Judge Birotte to use this draft opinion as a writing sample.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.:

Date:

Title:

Present: The Honorable **ANDRÉ BIROTTE JR., United States District Judge**

Carla Badirian
Deputy Clerk

N/A
Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None Appearing

None Appearing

Proceedings: **[In Chambers] Order GRANTING Defendants' Motion to Set Aside Default (Dkt. Nos. 30, 31)**

Before the Court is a Motion to Set Aside Entry of Default ("Motion," Dkt. Nos. 30, 31) filed by Defendants [REDACTED] ("Defendants").

Plaintiff [REDACTED] ("Plaintiff") filed an opposition. (Dkt. No 32.) Defendants filed a reply. (Dkt. No. 36.) The court finds the motion appropriate for resolution without oral argument and therefore **VACATES** the hearing set for [REDACTED]. See Fed. R. Civ. P. 78; Local Rule 7-15. For the following reasons, the court **GRANTS** Defendants' motion. Defendants are directed to file their answer within 7 days of this Order.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff served Defendants with the summons and complaint for this action on May 2, 2019 by personal service. (Dkt. Nos. 10, 11.) Defendants did not file a responsive pleading by the May 23, 2019 deadline to respond. (Dkt. No. 17 at 3.) Plaintiff then applied for entry of default against Defendants on June 10, 2019. (Dkt. No.

CIVIL MINUTES – GENERAL

1

13.) The Clerk granted Plaintiff's request, entering default against Defendants on June 12, 2019. (Dkt. No. 14.) Plaintiff then filed a motion for default judgment and provided notice of the motion to Defendants on [REDACTED]. Thereafter, on [REDACTED] Defendants filed an opposition to Plaintiff's motion for default judgment. (Dkt. No. 19.) Defendants also submitted to the Court an answer that it could file, if the default was vacated. (See Dkt. No. 21-1.) In light of Defendants' opposition and for reasons of judicial economy, the Court denied Plaintiff's motion for default judgment and directed the parties to meet and confer on the issue. (Dkt. No. 29.) Defendants subsequently requested that Plaintiff stipulate to setting aside default, but Plaintiff declined. (Dkt. No. 31 at 1-2.)

Now Defendants move to set aside the Clerk's entry of default pursuant to Federal Rule of Civil Procedure 55(c). (Dkt. Nos. 30, 31.) Defendants state that they did not file a response by the pleading deadline because "Plaintiff served the Complaint on [REDACTED] in an unexpected, non-customary manner that never reached [REDACTED] attorneys responsible for this matter who had been dealing with Plaintiff's counsel just the week before." (Dkt. No. 36 at 3:14-17.) Plaintiff states that "[a]ll the facts support a finding that [REDACTED] was properly served, that the legal department received service and that [REDACTED] intentionally failed to answer, waiting to make an appearance until a threat of judgment was upon them." (Dkt. No. 32 at 5:5-8.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 55(c) provides that a court may set aside a default for "good cause shown." "The 'good cause' standard that governs vacating an entry of default under Rule 55(c) is the same standard that governs vacating a default judgment under Rule 60(b)." *Franchise Holding II, LLC v. Huntington Rests. Grp., Inc.*, 375 F.3d 922, 925–26 (9th Cir. 2004) (citing *TCI Grp. Life Ins. Plan v. Knoebber* ("TCI"), 244 F.3d 691, 696 (9th Cir. 2001), *overruled on other grounds by Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001)).

The good cause analysis includes the following three factors: "(1) whether [the party seeking to set aside the default] engaged in culpable conduct that led to the default; (2) whether [it] had [no] meritorious defense; or (3) whether reopening the default judgment would prejudice the other party." *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle* ("Mesle"), 615 F.3d 1085, 1091 (9th Cir. 2010) (citation omitted). "[T]hese factors are disjunctive"; thus, a district court may deny the motion "if any of the three factors [are] true." *Id.* (citing *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000)).

III. DISCUSSION

a. Culpable Conduct

Defendants' conduct is culpable if it both: 1) "received actual or constructive notice of the filing of the action" and 2) "intentionally failed to answer." *Mesle*, 615 F.3d at 1092 (quoting *TCI*, 244 F.3d at 697) (emphasis in original). The Ninth Circuit has previously explained, in the context of analyzing whether to set aside an entry of default, "intentionally" means "devious, deliberate, willful, or bad faith failure to respond." *Id.* (quoting *TCI*, 244 F.3d at 698). However, "simply [] having made a conscious choice not to answer" is insufficient for the court to treat the defendant's conduct as culpable. *Mesle*, 615 F.3d at 1092 ("As we have previously explained, in this context the term 'intentionally' means that a movant cannot be treated as culpable simply for having made a conscious choice not to answer").

Defendants argue that "[they] failed to timely respond [because] Plaintiff served the Complaint on [REDACTED] in an unexpected, non-customary manner that never reached [REDACTED] attorneys responsible for this matter who had been dealing with Plaintiff's counsel just the week before." (Dkt. No. 36 at 3:14-17.) Defendants also assert that they "quickly appeared through undersigned counsel once [they] became aware that the Complaint had been served and the matter was proceeding." (Dkt. No. 36 at 3:17-18.) Defendants observe that "it appears Plaintiff served the Complaint on an individual employee [REDACTED] who is not authorized to accept service." (Dkt. No. 36 at 3:24-26.) Defendants also assert that Plaintiff's process server "does not declare that she confirmed that [REDACTED] is authorized to accept service as [REDACTED] 'general agent' or that [REDACTED] represented to her that she is authorized to accept service at all, nor did Plaintiff submit any signed documents from [REDACTED]." (Dkt. No. 36 at 4:19-23.) Finally, Defendants argue that "[n]othing in the record shows that [REDACTED] intentionally failed to answer or engaged in culpable conduct." (Dkt. 36 at 5:12-13.)

Plaintiff argues that "Defendants [REDACTED] still have not explained why, after the legal department was served and received a copy of the Complaint and supporting documents that it never filed an answer." (Dkt. No. 32 at 4:26-28-5:1.) Plaintiff also asserts that "[t]he above facts establish that [REDACTED] failed to answer the Complaint even after having received the Complaint, communicated extensively with Plaintiff's counsel on this matter and after both defendants were served." (Dkt. No. 32 at 5:2-5.) Finally, Plaintiff argues that "[a]ll the facts support a finding that [REDACTED] was properly served, that the legal department received service and that [REDACTED] intentionally failed to answer, waiting to make an appearance until a threat of judgment was upon them." (Dkt. No. 32 at 5:5-8.)

Under these circumstances and despite Plaintiff's expressed concerns about Defendants' lack of diligence, the Court finds Defendants did not engage in culpable

conduct. The record does not show any evidence that Defendants intentionally failed to answer. Although Plaintiff had been in contact with Defendants' in-house counsel prior to the entry of default, it does not appear that Plaintiff informed its in-house counsel contacts of the default. The reason Defendants did not respond is unclear. Defendants claim in-house counsel was unaware of service and Plaintiff claims Defendants were aware because Defendants' general agent was served. Even if Defendants' in-house counsel had been aware it was served, at most this shows Defendants' untimely response was careless. *See Mesle*, 615 F.3d at 1092 (“[S]imple carelessness is not sufficient to treat a negligent failure to reply as inexcusable, at least without a demonstration that other equitable factors such as prejudice, weigh heavily in favor of denial of the motion to set aside a default.”). As a result, the Court finds that Defendants did not act culpably and therefore this factor weighs in favor of granting Defendants' Motion.

b. Meritorious Defense

“All that is necessary to satisfy the ‘meritorious defense’ requirement is to allege sufficient facts that, if true, would constitute a defense: the question whether the factual allegation is true is not to be determined by the court when it decides the motion to set aside the default.” *Mesle*, 615 F.3d at 1094. A defendant’s burden to satisfy this factor “is not extraordinarily heavy.” *TCI*, 244 F.3d at 700.

Defendants argue that “[REDACTED] has submitted an Answer demonstrating its meritorious defenses.” (Dkt. No. 31 at 7:12-13.) Specifically, Defendants assert that they “[have] a number of meritorious defenses based on the Complaint” including “accused products do not appear to infringe[,]” no “factual allegations of unfair competition[,]” “Plaintiff has very narrow patent rights . . . [that] the accused products do not appear to meet[,]” “potential issues with the prosecution of the patents-in-suit[,]” and “Walmart did not manufacture or make the accused products.” (Dkt. No. 31 at 6-7.)

Plaintiff argues that “defendants [REDACTED] have failed to provide any facts, that if true, would support a defense of non-infringement or invalidity.” (Dkt. No. 32 at 6:10-11.) Plaintiff also asserts that “[REDACTED] has done nothing more than simply state that [REDACTED] does not infringe the patents because some of the features may be absent from the infringing product, with no factual support for this defense, and that the design patents are invalid because of potential issues with the prosecution, with no further support.” (Dkt. No. 32 at 8:8-12.) Moreover, Plaintiff argues that Defendants’ proposed answer to the Complaint “fails to provide any facts to support any claimed defense. The answer only provides admissions and denials of allegations made in the Complaint and makes general claims to affirmative defenses with no factual support for any of their defenses.” (Dkt. No. 32 at 8:17-20.)

Under the circumstances presented, the Court finds Defendants have alleged

[REDACTED]

sufficient facts that, if true, constitute a defense to Plaintiff's claims. Defendants have filed a proposed answer to the Complaint, which "indicates that Defendants can assert a meritorious defense." See *Uproar Entm't v. Collins*, No. CV 16-07288 AB (MRWx), 2017 WL 8229697, at *1 (C.D. Cal. Jan. 4, 2017) ("Furthermore, Defendants attempted to file their Answer and Counterclaims on November 10, 2016. This filing was stricken but it indicates that Defendants can assert a meritorious defense."). In reaching this determination, the Court does not express any opinion on the merits of Defendants' position and thus does not address Plaintiff's arguments to this effect.

c. Prejudice to Plaintiff

"To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying resolution of the case." *TCI*, 244 F.3d at 701. Rather, "the standard is whether plaintiff's ability to pursue his claim will be hindered." *Id.*

Defendants argue "there is no prejudice as the case has nearly been dismissed for lack of prosecution twice, and no substantive litigation has been undertaken." (Dkt. No. 31 at 7:26-28.) Defendants also argue that "Plaintiff has failed to make any showing that its ability to pursue its claim will be hindered by vacating the Clerk's entry of default." (Dkt. No. 36 at 7:23-24.)

Plaintiff argues it will be prejudiced because "defendants [REDACTED] have continued to allow new infringing product." (Dkt. No. 32 at 9:18-19.) Plaintiff also argues that since Defendants have "no defense to Plaintiff's claims of infringement, there is no reason to further delay the resolution of this matter." (Dkt. No. 32 at 10:15-16.)

Under these circumstances, the Court finds that since there is nothing in the record that shows that Plaintiff's ability to pursue its claim will be hindered, Plaintiff will not be prejudiced by allowing Defendants the opportunity to litigate this case on the merits. While there will be a delay in the resolution of Plaintiff's claims, "[t]o be prejudicial, the setting aside of a [default] must result in greater harm than simply delaying resolution of the case." See *TCI*, 244 F.3d at 701. Again, having considered Defendants' proposed answer and counterclaims, the Court finds sufficient information there to demonstrate a meritorious defense, and the Court does not otherwise decide whether Defendants indeed are likely to succeed on the merits.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Set Aside Default is **GRANTED**.

IT IS SO ORDERED.